No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES A. STAMOS
900 W. Jackson Boulevard
Suite 4-E
Chicago, Illinois 60607
(312) 666-7766
Counsel of Record

JAMES N. GRAMENOS
6743 N. LaPorte Avenue
Lincolnwood, Illinois 60646
(312) 677-7261
Pro Se

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Are fourth amendment rights violated when the police make an arrest for a minor misdemeanor, absent any exigent circumstances, on the uncorroborated allegations of a supermarket guard where the arresting officers (1) refused to interview available witnesses, (2) conducted no independent investigation, (3) never knew the guard or otherwise established his reliability, and (4) repeatedly refused or declined to hear the petitioner's version of the dispute when he denied the guard's allegations?

2. Has a private supermarket engaged in "state action" in violation of 42 U.S.C. Section 1983 where it knowingly engages in a customary plan or working agreement with the local police

(a) whereby the police allow the attesting of the necessary signatures to a store form-complaint out of the presence of the authorized state official in violation of state law and cause the perjurious document to be filed in the state court to initiate criminal charges, and/or

(b) whereby the police, without independent investigation or probable cause, will arrest anyone the store detains for shoplifting and designates for arrest?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
ILLINOIS STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
(a) Record In The District Court And Seventh Circuit Action	4
(b) Petitioner's Encounter At The Respondent Jewel Supermarket	7
(c) Police Failed To Speak To The Store Manager Or Other Witnesses Concerning The Improbability Of The Supermarket Guard's Allegations	9
(d) The Arrest By Police	10
(e) Criminal Proceedings In The State Court	12
(f) Section 1983 Complaint	13
REASONS FOR GRANTING THE WRIT:	
I.	
PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS ARRESTED BY THE POLICE WITHOUT A WARRANT FOR MISDEMEANOR RETAIL THEFT ON THE UNCORROBORATED ALLEGATIONS OF A SUPERMARKET SECURITY GUARD WHERE THE ARRESTING OFFICERS DECLINED TO INTERVIEW AVAILABLE WITNESSES, DECLINED TO IN-	

TERVIEW THE ACCUSED, AND DECLINED TO CONDUCT ANY INDEPENDENT INVESTIGATION PRIOR TO ARREST.

THE JUDGMENT OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT, THREE OTHER FEDERAL CIRCUITS, AND THE STATE OF ILLINOIS 14

A. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of The Fifth, Eighth And Tenth Circuits 15

B. The Decision At Bar Is In Conflict With Prior Decisions Of The Seventh Circuit .. 17

C. The Decision At Bar Conflicts With Decisions Of This Honorable Court Inasmuch As The Seventh Circuit Employs A Lower Standard Of Probable Cause To Validate Petitioner's Arrest 19

D. The Seventh Circuit Decision Interpreting Illinois Law Is In Conflict With The Decisions Of The Illinois Supreme Court 21

II.

JEWEL'S ILLEGAL UTILIZATION OF THE CRIMINAL COMPLAINT AND THE CUSTOMARY PLAN OR AGREEMENT WITH THE POLICE MADE JEWEL A STATE ACTOR LIABLE UNDER SECTION 1983 24

A. Jewel's Illegal Utilization Of The Criminal Complaint And Its Filing The Fraudulent Document In The State Court Creates Section 1983 Liability 24

B. Evidence Of A Customary Plan To Have Police Arrest Anyone Jewel Wanted Arrested 26

C. Jewel Used The Threat Of Arrest As A "Bargaining Chip" To Have Petitioner Accede To Their Demands 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	PAGE
Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)	6, 20
Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964)	19, 20, 21
Butler v. Goldblatt Bros. Inc., 589 F.2d 323 (7th Cir. 1978)	18, 19
Carrasco v. Klein, 381 F.Supp. 782 (E.D. N.Y. 1974)	25
Classon v. Shopko Stores Inc., 435 F.Supp. 1186 (E.D. Wis. 1977)	29
Delatte v. Genovese, 273 F.Supp. 654 (E.D. La. 1967)	25
Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959)	21
Duriso v. K-Mart No. 4195, Division of S.S. Kresge Company, 559 F.2d 1274 (5th Cir. 1977)	15, 27, 29
Dutton v. Roo-Mac, Inc., 100 Ill.App.3d 116, 426 N.E.2d 604 (1981)	22
El Fundi v. Deroche, Manager of Target Store No. 4, Division of Dayton-Hudson Corporation, 625 F.2d 195 (8th Cir. 1980)	17, 29
Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)	6, 20, 21, 24
Lugar v. Edmonson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)	25, 26

Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984), *vacated in part* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986) ... 16, 29, 30

Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985) 17, 18, 27, 29

People v. Foss, 18 Ill.App.3d 496, 309 N.E.2d 677 (2d Dist. 1974) 21, 22

People v. Tisler, 103 Ill.2d 226, 469 N.E.2d 147 (1984) 22, 23, 24

Rosenblatt v. Baer, 383 U.S. 75 (1966) 30

Smith v. Brookshire Brothers, Inc., 519 F.2d 93 (5th Cir. 1975) 16, 27

Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) 6, 20

United States v. Wiseman, 445 F.2d 792 (2d Cir. 1971) 25

Statutes

18 U.S.C. Sec. 2 25

18 U.S.C. Sec. 242 25

28 U.S.C. Sec. 1254(1) 2

28 U.S.C. Sec. 1331 4

42 U.S.C. Sec. 1983 ..... 2, 4, 13, 14, 25

Ill. Rev. Stat., ch. 38, Sec. 32-6 3

Ill. Rev. Stat., ch. 38, Sec. 107-2 3

Ill. Rev. Stat., ch. 38, Sec. 107-6 3

Ill. Rev. Stat., ch. 38, Sec. 107-14 3

Ill. Rev. Stat., ch. 38, Sec. 111-3 ..... 3, 13

Ill. Rev. Stat., ch. 110, Sec. 5 4

In The

Supreme Court of the United States

October Term, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner James N. Gramenos respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on July 25, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported in 797 F.2d 432, and is reprinted in the Appendix hereto, App. p. 1.

The memorandum decision of the United States District Magistrate, as adopted by the United States District Court for the Northern District of Illinois, has not been reported. It is reprinted in the Appendix hereto, App. p. 21. The order of the district court granting respondents' motion for summary judgment and adopting the report and recommendation of the magistrate is reprinted in the Appendix hereto, App. p. 20.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Sec. 1983, the petitioner brought this suit in the Northern District of Illinois on February 11, 1981. On September 11, 1985, the district court granted the respondents' motions for summary judgment. (App. 20).

On petitioner's appeal, the Seventh Circuit on July 25, 1986, entered a judgment and an opinion affirming the orders, except that portion granting summary judgment on the claim of excessive detention which was vacated and remanded to the district court for further proceedings. (App. 1, 17).

The petitioner filed a timely petition for rehearing and suggestion of rehearing en banc which was denied on August 29, 1986. (App. 19). The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

ILLINOIS STATUTES INVOLVED

Ill. Rev. Stat., ch. 38, Sec. 32-6. *Performance of Unauthorized Acts.* A person who performs any of the following acts, knowing that his performance is not authorized by law, commits a Class 4 felony: (pertinent text reads) . . . (b) Acknowledges the execution of any document which by law may be recorded; . . .

Ill. Rev. Stat., ch. 38, Sec. 107-2. *Arrest by Peace Officer.* (The pertinent text reads): . . . A peace officer may arrest a person when: (c) He has reasonable grounds to believe that the person is committing or has committed an offense.

Ill. Rev. Stat., ch. 38, Sec. 107-6. *Release by Officer of Person Arrested.* A peace officer who arrests a person without a warrant is authorized to release the person without requiring him to appear before a court when the officer is satisfied that there are no grounds for criminal complaint against the person arrested.

Ill. Rev. Stat., ch. 38, Sec. 107-14. *Temporary Questioning Without Arrest.* A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense as defined in Section 102.15 of this Code, and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.

Ill. Rev. Stat., ch. 38, Sec. 111-3. *Form of Charge.* (The pertinent text reads): . . . (b) An indictment shall be

signed by the foreman of the Grand Jury and an information shall be signed by the State's Attorney and sworn to by him or another. A complaint shall be sworn to and signed by the complainant. . . .

Ill. Rev. Stat., ch. 110, *Oaths and Affirmations.* (The pertinent text reads): . . . *Perjury.* Sec. 5. All oaths, affirmations, affidavits and depositions, administered or taken as provided in this act, shall subject any person who shall so swear or affirm willfully and falsely, in matter material to any issue or point in question, to like pains and penalties as are inflicted by law on persons convicted of willful and corrupt perjury.

STATEMENT OF THE CASE

(a) Record In The District Court And Seventh Circuit Action.

In a Section 1983 action, the Seventh Circuit affirmed the district court's grant of summary judgment as to all issues except the prolonged detention and incarceration of the petitioner, remanding that issue to the district court for further proceedings. (App. 17). The jurisdiction of the district court was invoked in a civil action for unlawful arrest and the deprivation of rights under 42 U.S.C. Sec. 1983, and under 28 U.S.C. Sec. 1331.

Petitioner alleged that he was arrested by respondent police without probable cause and prosecuted for retail theft, a misdemeanor, on the uncorroborated allegations of a private security guard while petitioner was shopping in respondent's supermarket. (R. 24). Officer Cosgrove testified that the customary procedure was that if any Jewel

guard had detained a person for suspected shoplifting, and had signed a Jewel form-complaint requesting the police to arrest, then "the arrests are made on the basis of the Complaints." (R. 32, para. 9, affidavit) (R. 94-R, pp. 18, 20-21, 46, Officer Cosgrove deposition). The Jewel form-complaint was a machine copy all-purpose form, modified by Jewel from the state court document provided to them by the police of the 18th District. (R. 94-V, pp. 37-40) (See App. 29).

Respondent Vaughn also deposed that this was "standard operating procedure", as established by Jewel corporate headquarters and the Chicago police. (R. 94-V, pp. 42-43). He deposed that the Jewel form-complaint was used as the company's "arrest report." *Id.* at 37-40.

Petitioner also alleged that he was unlawfully incarcerated at the 18th District police station cell for an excessive time, without being allowed his release on $100 bail. The Seventh Circuit agreed the detention was excessive and possibly imposed under improper motive. (App. 7). On the detention issue, it vacated the summary judgment and remanded the case for further proceedings. (App. 17).

The district court, citing authorities from the Eighth and Fifth Circuits, agreed with petitioner's theory of the case stating that "Courts have found state action when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments." (App. 26). The district court ruled that since the police in the instant case *did* conduct an independent investigation, that fact defeated petitioner's Sec. 1983 action alleging state action on the part of Jewel, and granted respondents' motions for summary judgment. (App. 21-27).

On appeal, the Seventh Circuit affirmed the judgment of the district court on several issues, but it did so only

after agreeing with the petitioner that in fact the verified record did *not* show independent investigation by the police officers. (App. 9). However, the Seventh Circuit affirmed the summary judgment on the issue of unlawful arrest holding that an independent investigation was not required to establish probable cause.

The Seventh Circuit, relying upon *dicta* from a 1974 Illinois Appellate Court case, stated, "In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest." (App. 11-12). It also added a new proposition of law (App. 13):

> "Police have reasonable grounds to believe a guard at a supermarket. We need not say that police are entitled to act on the complaint of an eyewitness; a guard is not just any eyewitness."

In this case, the verified record shows supermarket guard Vaughn to have been a part-time employee of Jewel for several months prior to the petitioner's arrest. Vaughn testified that he had a criminal conviction record. (R. 94-V, pp. 43-45, 55).

Using the above standards, the Seventh Circuit ruled that this Honorable Court in *Illinois v. Gates* overruled *Aguilar v. Texas* and *Spinelli v. United States* "in favor of a lower standard of probable cause." (App. 10-13). The Seventh Circuit reasoned that since "The Court has never suggested that the police, with such information in hand, must conduct a further investigation," there was no reason for independent investigation in petitioner's case. (App. 13).

As to the credibility of the supermarket guard, the Seventh Circuit acknowledged that the respondent officers had not personally known the respondent Jewel guard prior to this incident. (App. 6, 10, 13).

(b) Petitioner's Encounter At The Respondent Jewel Supermarket.

The dispute in this case arose when petitioner was accosted at a Jewel food store in Chicago, Illinois by respondent supermarket guard Johnny Vaughn. On February 12, 1980, petitioner was shopping on the premises of the respondent's retail supermarket. While petitioner was waiting in the checkout line, shortly before closing time, he removed a *People* magazine from a rack located adjacent to the checkout counter, paged through the publication, and returned the magazine to the rack. (R. 94-V, pp. 28-29).

Petitioner paid for his purchases and was confronted by respondent Vaughn, who did not speak or identify himself to the petitioner. *Id.* at 36-43. From prior personal experiences in that store petitioner believed that this person was a troublemaker unrelated to the store, involved in pilfering food, selling narcotics, or demanding money from shoppers. *Id.* at 43-44.

The petitioner requested the store cashier, who had just handled the money transaction with the petitioner, to summon a store manager. *Id.* at 45. Vaughn, without speaking, knocked several tubes of toothpaste off of the store's shelves, onto the aisle of the store, in full view of the cashier and other shoppers waiting in the checkout line. *Id.* at 51-52. Petitioner walked up to an individual in the shopping area of the store that he believed to be a supervisory employee and asked to speak to him. *Id.* at 53. However, Vaughn would not allow petitioner to speak to this man and announced in a loud voice that petitioner was under arrest. *Id.* at 53.

Respondent Vaughn forcefully pushed and shoved the petitioner into a back room security office with the assist-

ance of the black man the petitioner had mistaken for a store supervisor. *Id.* at 55. This individual was identified by Vaughn only as an "off-duty Chicago police officer." (R. 94-P, p. 25, state court transcript). Vaughn, in the presence of the off-duty Chicago police officer, told petitioner that he just wanted to talk to him. Upon arriving in the back room Vaughn demanded of petitioner that "you (petitioner) better have some money or you're going to jail." (R. 94-U, pp. 56-57) (R. 94-B, p. 5).

The store manager, Tinkovitch, who had witnessed the encounter in the shopping area of the store, entered the room and remained there throughout the confrontation in the security office attempting to resolve the dispute. (R. 94-T, pp. 27-36) (R. 94-U, pp. 68-69). The petitioner was searched but no store merchandise was found. (R. 94-T, pp. 27-36, store manager's deposition).

An unidentified Jewel Company stockboy entered the room and placed two tubes of *Gleem* toothpaste and a package of *D-Zerta* gelatin on the desk next to Vaughn. *Id.* To settle the dispute, Vaughn then demanded that the petitioner purchase the toothpaste and gelatin products the stockboy had brought into the room. (R. 94-U, p. 59). Petitioner refused respondent Vaughn's offer, stating that neither he nor his family used that brand of toothpaste or the gelatin product. *Id.* at 59, 64-65.

The following day, petitioner returned to the store and spoke to store manager Tinkovitch requesting permission to interview the cashier who waited on petitioner the previous evening, and any other store employees who witnessed the events. (R. 94-B, pp. 5-6) (R. 94-U, pp. 102-04) (R. 94-T, pp. 41-42). The store manager and security guard personnel refused the petitioner's request, and further refused to provide him with the names of the cashier and

other employees who were on duty when petitioner was ordered arrested by the Jewel. *Id.* The store manager, in his own handwriting, signed a memorandum on a store form stating that he was refusing petitioner's requests to either interview or otherwise identify persons who witnessed the activity concerning petitioner's arrest at the Jewel store.

(c) Police Failed To Speak To The Store Manager Or Other Witnesses Concerning The Improbability Of The Supermarket Guard's Allegations.

The store manager was never interviewed by the police. He deposed that his observations of the dispute between petitioner and respondent Vaughn, the supermarket guard, showed a high probability that the merchandise that guard Vaughn was attempting to attribute to the petitioner was unjustified. (R. 94-T, pp. 29-32). The supermarket guard deposed that he had brought the merchandise, which he had accused petitioner of attempting to steal, into the security room. (R. 94-V, pp. 85-87). The store manager deposed that this was not true.

The verified record shows that the store manager contradicted the respondent guard's allegations. The store manager deposed that he had observed the confrontation between petitioner and guard Vaughn in the shopping area of the store and specifically looked for but did not see any merchandise, either in the petitioner's or guard Vaughn's possession. (R. 94-T, pp. 17-20, 26-36). Instead, the store manager deposed that he had heard guard Vaughn instruct the store's stockboys to look through the store aisles and bring some merchandise into the security room without identifying what items the employees were to recover. *Id.* at 35-36.

The store manager deposed that it was not unusual to find things out of place throughout the aisles in the store, and that he personally picked up items which had been discarded by shoppers from the floor nearly every hour of the day. *Id.* at 30-31.

The police never interviewed the store manager, or other witnesses who would have been material witnesses as to the issue of probable cause to arrest. The Seventh Circuit said that in this misdemeanor case the police "may have exercised poor judgment" but held (App. 17):

> "We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices."

(d) The Arrest By Police.

When petitioner refused to accede to the Jewel security guard's demand to settle the dispute by paying approximately $3.00 to Vaughn, the security guard telephoned the police by calling the "911 emergency" number. (R. 94-P, p. 10) (R. 94-U, p. 60). Officers Cosgrove and Schmit, the respondents in this case, were in their squad car and received a radio call that "Jewel was holding a shoplifter for the police" and immediately proceeded to the supermarket. (R. 32, police affidavits).

At 11:55 p.m., minutes before the midnight closing hour, Officers Cosgrove and Schmit entered the back room security office and found assembled the petitioner, the store guard Vaughn, the store manager, Tinkovitch, and the off-duty Chicago police officer. (R. 94-P, p. 25) (R. 24, para. 18) (R. 94-U, pp. 55-62).

Without any verbal accusation of theft or other crime, Vaughn exhibited the store merchandise and told the police that the petitioner had refused to pay or cooperate. *Id.* Vaughn handed the police a copy of the Jewel all-purpose criminal complaint-form maintained on a clipboard in the Jewel security office. (R. 38) (App. 29 is an exact copy utilized by respondents against the petitioner in this case) (R. 94-U, pp. 68-69). In deposition, Vaughn agreed that he did not have any conversation with the police in the security office (R. 94-V, p. 96).

Moments later, another unidentified stockboy entered the back room and placed a jar of baby food next to the toothpaste and *D-Zerta* gelatin which a stockboy had previously brought into the room prior to the arrival of the police officers. (R. 94-U, pp. 61-63).

Officer Cosgrove demanded that petitioner produce his driver's license. Without asking petitioner any questions, Officer Cosgrove searched the petitioner and prepared to handcuff him. Petitioner told the police that "you can't do this, I want you to talk to witnesses and get my side of the story. I am an assistant public defender, I am a lawyer." *Id.* at 66. Officer Cosgrove responded by stating "then you know you don't have to talk to us." *Id.* at 66-67.

Petitioner told Officer Cosgrove that (1) he wanted to relate his version of what occurred to the police concerning the encounter, and (2) he asked the police respondents to speak to the store cashier, and other people still on the store premises who had witnessed the events. *Id.* at 66-68. Officer Cosgrove told the petitioner he would not and immediately handcuffed the petitioner and proceeded to take him out of the security office. (R. 94-B, p. 7, petitioner's affidavit).

While handcuffed, and being taken toward the exit door of the market, petitioner asked the police if they would get the names of the shoppers who were still in the store, and the names of the cashier and store employees who witnessed the events. *Id.* The time was midnight and the store was closed. (R. 94-T, pp. 39-40). The police refused the request and took petitioner to the police car. The petitioner requested that a supervisory police official be called to the scene to assess the facts and resolve whether or not the petitioner should be further detained. (R. 94-U, p. 71). The police pushed and shoved the petitioner into the rear seat of the police car and transported him to the 18th District station located four blocks from the supermarket. *Id.* At the 18th District police station the respondents refused to allow the petitioner to be interviewed by police, detectives, or state's attorney personnel concerning his version of the events. The respondent police officers, Schmit and Heatley said that petitioner would be incarcerated for four hours. (R. 24, para. 1, 7) (R. 94-U, pp. 77-88) (R. 94-B, p. 11, petitioner's affidavit). The petitioner was placed in a jail cell until 4:15 a.m. without being allowed to post $100 bond to effect his release. (R. 94-U, pp. 73-83, 84-100).

(e) Criminal Proceedings In The State Court.

On March 24, 1980, petitioner was prosecuted on the basis of the respondent Jewel's all-purpose criminal complaint-form. (See copy, App. 29). Following the state's case-in-chief, with respondent Vaughn being the only prosecution witness to appear in court, the state trial judge entered a finding of not guilty. (R. 94-P, p. 31).

Despite the acquittal, petitioner suffered grievous losses in his law practice and health, as well as continued losses to his professional and personal reputation.

(f) Section 1983 Complaint.

Petitioner instituted this civil rights damage action pursuant to 42 U.S.C. Section 1983. The complaint alleged that respondents had acted in furtherance of a "concerted and customary plan" whereby Jewel (supermarket) was illegally permitted by the 18th District Chicago police, including the respondent police officers, to cause the arrest and prosecution of persons whom Jewel agents designated as shoplifters, without establishing probable cause as is required by the fourth and fourteenth amendments to the Constitution. (R. 24).

The complaint also alleges that the arrest and prosecution of petitioner by respondents, was without probable cause, and based solely on the submission of a form-complaint given to them by Jewel supermarket guard Johnny Vaughn. (R. 24, para. 3). The respondent arresting police officers, in their answer to petitioner's amended complaint, admitted that the arrest of petitioner was based solely on the respondent supermarket's criminal complaint. (R. 43, para. 4).

Illinois law mandates that a criminal complaint be sworn. *Ill. Rev. Stat.*, ch. 38, Sec. 111-3(b). Petitioner's amended complaint alleges that the criminal complaint processes used against the petitioner by respondents to arrest and prosecute him were in violation of various state felony statutes.

Illinois law mandates that a criminal complaint be sworn. *Ill. Rev. Stat.*, ch. 38, Sec. 111-3(b). The amended complaint alleged that the respondent police officers and Jewel engaged in a customary plan or agreement, which if true, would subject them to felony convictions, for violating the state law in executing the criminal complaint against the petitioner. (R. 24, Count I & II, para. 8-10,

13-14, Count II, para. 19-22). The Seventh Circuit agreed that the Jewel criminal complaint was not properly sworn and that Sgt. Heatley and Jewel falsely executed the court document. (App. 2). The Seventh Circuit said, "We will assume that the procedure of attesting the signature out of the presence of the witness violates state law." (App. 2).

Petitioner alleged in his amended complaint that the illegal execution of the Jewel form-complaint and the method by which it was used against the petitioner was in violation of his fourth and fourteenth amendment rights; that the filing and recording of this illegally executed court document was violative of petitioner's rights to due process of law and actionable under 42 U.S.C. Sec. 1983.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS ARRESTED BY THE POLICE WITHOUT A WARRANT FOR MISDEMEANOR RETAIL THEFT ON THE UNCORROBORATED ALLEGATIONS OF A SUPERMARKET SECURITY GUARD WHERE THE ARRESTING OFFICERS DECLINED TO INTERVIEW AVAILABLE WITNESSES, DECLINED TO INTERVIEW THE ACCUSED, AND DECLINED TO CONDUCT ANY INDEPENDENT INVESTIGATION PRIOR TO ARREST.

THE JUDGMENT OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT, THREE OTHER FEDERAL CIRCUITS, AND THE STATE OF ILLINOIS.

In the case at bar the Seventh Circuit created a new standard for probable cause and a new exception to it for

allegations made by private security guards. The Seventh Circuit held that probable cause to make a warrantless arrest in a misdemeanor case was established by the uncorroborated allegations of a supermarket guard, and that the police were not required to interview witnesses who were on the scene, nor to interview the accused to obtain his version of the facts.

This ruling is contrary to decisions of other circuit courts that have ruled on this issue, contrary to prior decisions of the Seventh Circuit itself, contrary to decisions of this Honorable Court, and contrary to the law of the State of Illinois.

A. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of The Fifth, Eighth And Tenth Circuits.

The decision of the Seventh Circuit at bar is in direct conflict with the decision of the Fifth Circuit in *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977), where the court failed to find probable cause in a similar situation. In that case Duriso had been shopping in K-Mart, a discount merchandise store. The assistant manager accused him of leaving the store without paying for several packs of cigarettes. The police were called. They searched Duriso and found nothing. They then arrested him, pursuant to a form-complaint signed by the assistant store manager, charging him with petty theft. After his criminal charges were dismissed, Duriso filed suit under Section 1983, and was awarded damages by a jury. The Fifth Circuit affirmed, holding that the police lacked probable cause to arrest.

In the case at bar, the police had no more information than the police had in the *Duriso* case. No merchandise was found on the petitioner's person. A form-complaint signed by the store security guard was the sole basis for

the arrest, and neither the petitioner nor any other available witnesses were interviewed by the police prior to arrest. Under these circumstances, although the Seventh Circuit found probable cause, it is clear that the Fifth Circuit would not have done so under the authority of *Duriso*.

Similarly, in *Smith v. Brookshire*, 519 F.2d 93 (5th Cir. 1975) the Fifth Circuit found no probable cause when shoppers were arrested solely at the request of store employees. Plaintiffs were shopping for groceries in Brookshire Bros., a food store in Texas, when they were accused of stealing a jar of cold cream. The police were summoned, and they arrested the shoppers on the basis of the store manager's statements. The charges were later dismissed, and the shoppers filed suit under Section 1983. In awarding damages to the plaintiffs, the district court held that there was no reasonable grounds to detain the shoppers. In affirming, the circuit court stated:

> "In sum, the police had detained the appellees without independently establishing that there was probable cause to do so. . . . Instead, they depended on the conclusory assessment of the store officers." 519 F.2d 93, 94.

Clearly then, there is a conflict between the Fifth Circuit and the Seventh Circuit as to whether the uncorroborated statement of a merchant's employee, without more, will suffice for probable cause.

The Tenth Circuit also disagrees with the Seventh Circuit on this issue and agrees with the Fifth Circuit. In *Lusby v. T.G.&Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *cert. granted and judgment vacated* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986). Lusby was accused of not paying for a pair of sunglasses by a private security guard employed by the store. The police were

called, and they arrested Lusby and his brothers without conducting any independent investigation to determine whether probable cause existed. They failed to interview any other store employees, such as the cashier, or other witnesses in the store who might have been able to corroborate or contradict the security guard's allegations.

In an action for damages pursuant to Section 1983, the jury found in favor of the Lusbys. In affirming, the Tenth Circuit noted that the jury had been instructed in the elements of probable cause and therefore could conclude that a reasonable police officer would have known he was violating Lusby's rights. *Accord, El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980) (allegation of unlawful arrest by police following detention by store security guards constitutes facts sufficient to state a claim under Sec. 1983. Summary dismissal was improper).

B. The Decision At Bar Is In Conflict With Prior Decisions Of The Seventh Circuit.

In *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985) there was a dispute over a restaurant bill. Six diners were arrested by the police at the request of the restaurant owner and charged with theft. The police were criticized by the Seventh Circuit for failing to independently investigate the case, and for arresting the diners without hearing their version of what occurred at the restaurant. The district court had relied on a line of cases which held that information supplied by a citizen informer regarding an alleged crime was sufficient to establish probable cause. In *Moore* the Seventh Circuit rejected the applicability of those cases to this situation, noting that those cases were all felony cases, and this was a misdemeanor case. The court stated, "There was neither a threat to the officers' safety, nor a large amount of

money involved in dispute, nor any serious crime committed." 754 F.2d 1336, 1345 (7th Cir. 1985). Therefore, the police "could not have thought that they had to strike swiftly to protect the public safety." 754 F.2d 1336, 1357.

Similarly, in the case at bar, petitioner was charged with a minor misdemeanor, the amount in dispute being less than $4.00, and the police arrested petitioner at the request of the supermarket guard. There was neither a threat to the officer's safety, nor a large amount of money involved, nor any serious crime committed. Yet, the police refused to allow the petitioner an opportunity to tell his version of what occurred, nor did they interview the store manager or other available witnesses. Clearly, under the *Moore* test probable cause for arrest was not established in the petitioner's case.

In an earlier case, *Butler v. Goldblatt Bros. Inc.*, 589 F.2d 323 (7th Cir. 1978) the Seventh Circuit had also stressed the importance of independent investigation in the determination of whether or not there was probable cause. In *Butler*, an informant working as an undercover agent for Goldblatt Bros., informed their security department that a security guard who was to testify in court was the subject of a murder plot. The Goldblatt security director called the police and told them of the plot, without divulging the name of the informer. On the day of the court hearing, the subject security guard notified the police that he had been threatened in the courtoom by a Mr. Lewis. Lewis and his companions were arrested by the police and held in detention for up to fifteen hours before they were released. Lewis and his companions then filed suit under Section 1983 and for false arrest under state law.

In analyzing whether the police had probable cause for the warrantless arrests, the Seventh Circuit stated,

> "the officers had probable cause [if] . . . at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the [Goldblatt] employees had committed or [were] committing an offense. *Beck v. Ohio,* 379 U.S. 89, 91 (1964)." 589 F.2d at 325.

The Seventh Circuit continued its analysis by stating that the determination of probable cause would hinge on the weight to be given the information supplied by the informant. That weight, however, could only be determined after an assessment of the informer's credibility and the reliability of his information. With respect to the reliability of information received from the informant, the Seventh Circuit concluded,

> "it is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations . . . a reasonable man could not find that the arrests were based upon probable cause." 589 F.2d at 325-326.

Thus, it is clear that the decision at bar not only conflicts with decisions of other circuits, but even conflicts with prior Seventh Circuit cases in its failure to require independent investigation by the police in minor misdemeanor cases as a prerequisite for probable cause.

C. The Decision At Bar Conflicts With Decisions Of This Honorable Court Inasmuch As The Seventh Circuit Employs A Lower Standard Of Probable Cause To Validate Petitioner's Arrest.

The standard applied by this Court in determining whether there is probable cause to arrest has traditionally depended upon whether,

> "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

This test was interpreted in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) to mean that a prudent man would determine that he had "reasonably trustworthy information" if his informant was credible and his information reliable. In *Illinois v. Gates*, 462 U.S. 213 (1983) this Honorable Court rejected the rigid two-prong approach of *Aguilar* and *Spinelli* which required that both the "credibility" prong of the probable cause requirement and the "reliability" prong be fully satisfied, in favor of a more flexible approach to probable cause. Under the *Gates* approach, an assessment may be made of both the credibility of the informant and the reliability of the information together to determine whether upon "the totality of the circumstances," probable cause may be established. However, nowhere in the opinion of this Court in *Gates* is there the slightest suggestion that the standard of probable cause has been lowered. Yet, in the case at bar, the Seventh Circuit states unequivocally that *Gates* postulated, "a lower standard of probable cause." (App. 13).

Although *Gates* may have rejected the rigid two-prong approach of *Aguilar* and *Spinelli*, it did not obviate the need for independent investigation by the police and corroboration of an informant's tip. Quite the contrary, *Gates* is a classic example of the requirement of independent investigation and the need for corroboration of an informant's tip. It involved an unsigned letter to the police notifying them that Mr. and Mrs. Gates were involved in narcotics traffic. It described their modus operandi, includ-

ing flights to Florida, specific motels, and other details. In affirming the conviction in *Gates*, this Court noted that the police did not simply arrest on the basis of the informer's tip, but conducted a thorough and detailed investigation prior to arrest in an attempt to corroborate the information received from the informant. Certainly, the ruling of the Seventh Circuit at bar conflicts with the decisions of this Court in *Beck v. Ohio, supra*, and *Illinois v. Gates, supra*. It is in conflict with these decisions in that it rejects the necessity for independent investigation by the police of a supermarket guard's uncorroborated accusation prior to a warrantless arrest for a minor misdemeanor. It is also in conflict with these decisions when it holds that after *Gates* there is "a lower standard of probable cause." (App. 13). *See also Draper v. United States*, 358 U.S. 307 (1959) (where this Court found probable cause based upon the detailed and corroborated information of a credible informer who had provided the police with accurate information in the past).

D. The Seventh Circuit Decision Interpreting Illinois Law Is In Conflict With The Decisions Of The Illinois Supreme Court.

The Seventh Circuit, relying upon *dicta* from a 1974 Illinois appellate court case affirmed the grant of summary judgment in this case primarily on the following inaccurate proposition of law (App. 11-12):

> "In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest. E.g., *People v. Foss*, 18 Ill.App.3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974)."

People v. Foss, does not appear in any volume of Shepards as cited authority for this proposition because this is neither the law of the State of Illinois nor the holding

of the case. For example, in *Dutton v. Roo-Mac, Inc.*, 100 Ill.App.3d 116, 426 N.E.2d 604 (1981), the court held that when an arresting officer relies solely on the information which a restaurant employee gave him in making the arrest, without conducting an independent investigation, this unlawful arrest will support a state action for false imprisonment.

In *People v. Foss, supra,* the only issue was whether or not a person has the right to resist an illegal arrest by police. The *Foss* opinion actually is authority for the proposition that "a police officer may not make an arrest unless he believes that probable cause exists, justifying the arrest." 309 N.E.2d at 678. *People v. Foss* is not authority for the proposition relied upon by the Seventh Circuit. (App. 11-12). In fact, *Foss* states the established rule in Illinois that allows a person arrested,

> ". . . to inquire of the police as to the reason for the arrest; point out the officer's mistake; protest and argue; but no one is allowed to impede the police arrest by physical action."

18 Ill.App.3d 496, 497, 309 N.E.2d 677, 678.

The Illinois Supreme Court recently reaffirmed the long-standing rule that Illinois follows "the decisions of the United States Supreme Court on identical State and Federal constitutional problems," including the fourth amendment issue of warrantless arrests and the need for probable cause stating,

> "The Code of Criminal Procedure of 1963 allows a warrantless arrest only when a peace officer 'has reasonable grounds to believe that the person is committing or has committed an offense.' (*Ill. Rev. Stat.* 1983, ch. 38, par. 107-2(1)(c)). As used in the statute, 'reasonable grounds' is considered to have the same substantive meaning as 'probable cause.' *People v.*

> *Wright*, 56 Ill.2d 523, 528-29, 309 N.E.2d 537 (1974), quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)."

People v. Tisler, 103 Ill.2d 226, 469 N.E.2d 147, 153, 156 (1984). The substance of the information contained on the criminal complaint form did not contain sufficient facts to justify the warrantless arrest of petitioner. (See App. 29). The Illinois standard is detailed in *People v. Tisler, supra*, and explained in the opinion as follows:

> "In reference to Federal and State warrant requirements, this court has explained that a detached judicial officer must resolve the question of whether probable cause exists to justify issuing a warrant. The decision is to be based on information contained in sworn statements or affidavits that are presented to the magistrate [citations]. Whether probable cause exists in a particular case turns on the 'totality of the circumstances and the facts known to the officers and court when the warrant is applied for.' "

Tisler, 469 N.E.2d 147, 152. Inasmuch as the arresting officers admitted in their *answer* to petitioner's amended complaint, and their *affidavits* as filed in the district court, that the arrest of petitioner was based solely on the Jewel store's complaint form, it is obvious the information as contained in that document does not meet the state or federal standards for probable cause. (R. 43, para. 10, police *answer* to petitioner's amended complaint) (R. 94-R, pp. 40-42, Cosgrove's deposition) (R. 32, para. 9, police *affidavit*, "the arrests are made on the basis of the Complaints.") (See App. 29, reproduced copy of the Jewel criminal complaint used in this case). The Illinois Supreme Court has made it clear that when a police officer acts as his own magistrate in effecting a warrantless arrest "the probable cause standard is at least as stringent as those that guide a magistrate in deciding whether or not to issue a warrant." *Tisler, supra*, 469 N.E.2d 147, 153.

The Illinois Supreme Court approved the "totality-of-circumstances standard" mandated by this Honorable Court, ruling that "we adopt the *Gates* standard for resolving probable cause questions under the Illinois Constitution that involve an informant's tip." *Tisler*, 469 N.E.2d at 157. The Seventh Circuit erred in attributing to the State of Illinois the proposition that "In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest." (App. 11-12). The Seventh Circuit admitted that this Honorable Court "had not spoken on the question" and has improperly used the erroneous proposition as a rule of law in petitioner's case to justify probable cause to arrest. (App. 11-13).

II.

JEWEL'S ILLEGAL UTILIZATION OF THE CRIMINAL COMPLAINT AND THE CUSTOMARY PLAN OR AGREEMENT WITH THE POLICE MADE JEWEL A STATE ACTOR LIABLE UNDER SECTION 1983.

Any one of the following "special accommodations" would clearly indicate the joint participation between the police and the personnel of Jewel in *state action.* The cumulative effect of all of them is to establish without question the existence of a *customary plan or agreement* whereby Jewel exercised the prerogatives and power of the state.

A. Jewel's Illegal Utilization Of The Criminal Complaint And Its Filing The Fraudulent Document In The State Court Creates Section 1983 Liability.

The Seventh Circuit properly found that the respondents in this case violated state law because of the procedure which both Jewel and the police used in attesting to the signature in the affidavit portion of the complaint. (App. 2-3). However, the Seventh Circuit incorrectly concludes

this violation of state criminal law to be of no federal constitutional significance. (App. 3-4).

The Seventh Circuit has ignored the various Supreme and federal circuit court cases holding that the placing of signatures on local city and state forms, without the formality required by law, is in violation of the criminal and civil provisions of the federal civil rights act.

In *Carrasco v. Klein*, 381 F.Supp. 782 (E.D. N.Y. 1974), the defendants had violated Sec. 1983 by falsely claiming in a civil case that the affidavit, as filed, had in fact been sworn to before filing the document in the court system. The respondents in the case at bar are similarly liable for falsely stating that the criminal complaint was executed in conformity with the requirements of law. The respondents' motions for summary judgment should have been denied in the case at bar, as it was in *Carrasco*, 381 F.Supp. at 785. *Accord Delatte v. Genovese*, 273 F.Supp. 654 (E.D. La. 1967) (Sec. 1983 violation when public employee violates his duties under state statute and is the ultimate cause of plaintiff's commitment).

An example of private persons placing signatures on local government court forms, resulting in violations of the federal civil rights act, occurred in *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971). In *Wiseman*, the two criminally accused defendants merely placed their signatures on a form entitled *affidavit of service* and filed them in the civil clerk's office in New York City. These two persons were both convicted of violation of the criminal aspects of civil rights under 18 U.S.C. Sections 2 and 242, which carry essentially the same language of Sec. 1983. *Wiseman* illustrates that a falsely executed affidavit violates the "under color of" clause of Sec. 1983, mandating a finding of state action. 445 F.2d at 794.

In *Lugar v. Edmonson*, 457 U.S. 922 (1982), this Honorable court said that the defendants' utilization of State

court processes, through misuse by a private person, is subject to constitutional restraints and may properly be addressed in a Sec. 1983 action. 73 L.Ed.2d at 498. *Lugar* teaches that to act "under color" of law does not require that Jewel, in the case at bar, be an officer of the State.

B. Evidence Of A Customary Plan To Have Police Arrest Anyone Jewel Wanted Arrested.

The Seventh Circuit correctly stated the applicable law creating state action, "if the police promise to arrest anyone the shopkeeper designates, then the shopkeeper is exercising the state's function and is treated as if he were the state." (App. 5). The verified record in this case is replete with admissions from both the police and the Jewel respondents that the police would arrest anyone the Jewel wanted arrested. (R. 94-R, pp. 13-21, 46) (R. 32, para. 9-11, affidavit of Officer Cosgrove) (R. 94-V, pp. 39-43) (R. 43, para. 10, police answer to petitioner's amended complaint). For example, this is illustrated in the record as follows (R. 94-R, pp. 20-21):

> Q. (Plaintiff's Counsel): Now, with respect to the complaint that would have already been filled out, what would have been the normal course of business that you would have followed? You are at the Jewel, the Jewel person is in the security room and the security guard is there, you got the complaint filled out. In your experience, what would have happened next?
>
> A. Can you repeat that, please?
>
> Q. Sure. (Question read back as requested)
>
> A. Well, if the Jewel wanted the individual arrested, we would arrest him.
>
> Q. They would be arrested; right?
>
> A. Sure.
>
> Q. What would happen then?
>
> A. We would take them to the station and process them.

The Seventh Circuit properly states that a private party comes within Sec. 1983 only when "he is a willful participant in joint action with the State or its agents. . . ." (App. 5). The Seventh Circuit correctly states that shopkeepers are engaged in state action when they strike a deal with the police under which the police simply carry out the shopkeepers' directions. If the police promise to arrest anyone the shopkeeper designates, then the shopkeeper is exercising the state's function and is treated as if he were the state. (App. 5).

The Seventh Circuit said that this principle is the basis for the finding of state action in various cases including *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977); *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975); *Moore v. Marketplace Restaurant*, 754 F.2d 1336 (7th Cir. 1985), and many other cases. (App. 5).

The Seventh Circuit incorrectly states that every witness in deposition stated that there was no agreement, and the police exercised independent judgment. (App. 7). The Seventh Circuit is also incorrect in stating that each witness "denied that there was any arrangement, plan or scheme under which the police would arrest anyone Jewel wanted arrested." (App. 6). Contrary to the Seventh Circuit's assertions, the record in this case shows that petitioner did in fact present evidence, through the deposition testimony of the respondents themselves, that the police had arrested anyone Vaughn and other Jewel security agents designated for arrest in the past. (R. 94-V, pp. 42-43) (R. 94-R, Officer Cosgrove Deposition, pp. 18, 20-21, 46).

Further, the Seventh Circuit incorrectly characterizes the police arrest process at the Jewel by stating, "If the guard thought the evidence strong, then the police had to decide what to do." (App. 7). This is contrary to the

record in this case. The deposition testimony of Jewel and the police shows that whenever Jewel's guard wanted a person arrested, the 18th District police would arrest. (R. 94-V, pp. 42-43) (R. 94-R, pp. 20-21) (R. 32, para. 9).

The totality of the evidence, in the record of the instant case, demonstrates the essentials of the basic plan, with the keynote expressed by Officer Cosgrove in deposition: "Well, if the Jewel wanted the individual [detained] arrested, we would arrest him." (R. 94-R, pp. 18, 20-21, 46).

C. Jewel Used The Threat Of Arrest As A "Bargaining Chip" To Have Petitioner Accede To Their Demands.

Instead of investigating the dispute between the Jewel security guard and the petitioner, the police testified that they assisted Jewel in using the threat of arrest to coerce the petitioner to accede to the security guard's demands that the petitioner pay for the merchandise in dispute. This is shown in the verified record:

> Q. (Stamos, Petitioner's Counsel): . . . What happened next on that scene?
> A. (Officer Cosgrove): Well, we inquired to what they wanted done here, how they wanted us to handle the situation.
> Q. That's Jewel?
> A. Right.
> Q. And what did they tell you?
> A. They said they wanted Mr. Gramenos to pay for the articles. He said he wasn't going to pay for anything. They said, well, we want him arrested.
> Q. So, in your presence, it's your recollection that Gramenos was asked to pay for the articles as a matter of resolving the dispute?
> A. Right.

(R. 94-R, pp. 40-41).

Officer Cosgrove's own testimony conclusively shows that the police relied upon the Jewel security guard to tell them what to do. *Id.* at 18. The police followed a policy that allowed Jewel's security guards to substitute their judgment for that of the police. Such cooperative activity between the police and Jewel is sufficient to make Jewel a party acting under color of state law. *E.g., Lusby v. T.G.&Y. Stores, supra*; *Classon v. Shopko Stores, Inc.*, 435 F.Supp. 1186 (E.D. Wis. 1977); *Duriso v. K-Mart, supra*; *El Fundi v. Deroche, Manager Target Store*, 625 F.2d 195, 196 (1980); *Moore v. Marketplace Restaurant, Inc., supra.*

Officer Cosgrove testified to a different procedure he would follow in non-merchant cases. (R. 94-R, pp. 13-21). He deposed that in misdemeanor cases, other than merchant cases, whenever any person was accused of a crime, which was not witnessed by the police, Cosgrove would conduct an independent investigation. The process that he would follow in non-merchant cases would include talking to the accused and conducting an interview to determine the accused's version of the incident. (R. 94-R, pp. 13-21). This is essentially the investigative technique mandated by the Seventh Circuit in minor misdemeanor cases. *See Moore v. Marketplace Restaurant, supra.* It was *not* done in the case at bar.

Unlike the investigative techniques, as outlined above, Officer Cosgrove testified that in Jewel shoplifting allegations, "When the police are called in, arrests are made on the basis of the Complaints." (R. 32, para. 9, *affidavit* of Officer Cosgrove, April 1981). In this case, it is evident that the police substituted the judgment of a private corporation for their own official state authority.

Since the police did not independently investigate the Jewel security guard's allegations of a misdemeanor of-

fense, as a matter of police and Jewel standard operating procedure, this left Jewel with the authority to bring its own criminal charges. Thus, Jewel exercised a State inquisitorial right. This same activity was held violative of Sec. 1983 in *Lusby v. T.G.&Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *vacated in part* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986), and the store was held to be acting under color of state law. 749 F.2d at 1433.

CONCLUSION

In conclusion, there are few more horrifying experiences than that of being suddenly snatched from a peaceful and orderly existence and placed in the helpless position of having one's liberty restrained, under the accusation of a crime. Society's pervasive and strong interest in preventing and redressing attacks upon reputation is noted in *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). For the various reasons presented herein, this petition for certiorari should be granted.

Respectfully submitted,

JAMES A. STAMOS
900 W. Jackson Boulevard
Suite 4-E
Chicago, Illinois 60607
(312) 666-7766
Counsel of Record

JAMES N. GRAMENOS
6743 N. LaPorte Avenue
Lincolnwood, Illinois 60646
(312) 677-7261
Pro Se

APPENDIX

INDEX TO APPENDIX

	PAGE
Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, July 25, 1986	1
Order of the United States Court of Appeals for the Seventh Circuit Denying Rehearing, August 29, 1986	19
Order of the United States District Court for the Northern District of Illinois Granting Defendants' Motion for Summary Judgment and Adopting the Report and Recommendation of the Magistrate, September 11, 1985	20
Report and Recommendation of the Magistrate, June 25, 1985	21
Petitioner's Exhibit 1	29

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2767

JAMES N. GRAMENOS,

Plaintiff-Appellant,

v.

JEWEL COMPANIES, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 C 709—**John A. Nordberg,** *Judge.*

ARGUED MAY 14, 1986—DECIDED JULY 25, 1986

Before POSNER and EASTERBROOK, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

EASTERBROOK, *Circuit Judge.* Johnny Vaughn, a security guard at a Jewel supermarket, stopped James Gramenos, a customer, at 11:30 p.m. as he was leaving the store. Gramenos remonstrated with Vaughn and then ran through the store. Vaughn caught him and held him in an office until Joseph Schmit and Frank Cosgrove, officers of the Chicago police, arrived. Vaughn accused Gramenos of

---

* Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

shoplifting, displaying a jar of baby food, a box of gelatin, and two tubes of toothpaste, which Vaughn said he had seen Gramenos put in his pocket while shopping and then scatter during his dash through the aisles. Gramenos denied stealing the items, stating that he first had taken Vaughn for an assailant and then, on learning that Vaughn was a guard, had gone in search of the store's manager to complain about Vaughn's behavior. Vaughn signed a complaint. The police arrested Gramenos, who protested: "You can't do this. I want to talk to witnesses and get my side of the story. I am a lawyer. I am a public defender." (One patron in the store recalls that Gramenos kept saying: "You can't arrest me, I'm a lawyer.") The police let him go at 4:15 a.m. after he posted a $100 bond.

Gramenos was prosecuted and acquitted. Vaughn was the only witness for the state, and at the end of Vaughn's testimony the judge stated: "I think on all things I think there is a misunderstanding. I have a doubt. Finding of not guilty." Gramenos then turned the tables, filing this suit under 42 U.S.C. §1983 against the supermarket, Vaughn, the two arresting officers, and Sgt. Frank Heatley, the desk officer at the police station at which Gramenos was held. After discovery had been completed, the defendants moved for summary judgment. A magistrate recommended that the district judge grant the motion; the judge did so, adopting the magistrate's short opinion.

I

Illinois law requires that a criminal complaint be sworn. Ill. Rev. Stat. 38 §111-3(b). Vaughn's complaint was not properly sworn. Vaughn signed the complaint, but not in the presence of the attesting officer, Sgt. Heatley. Gramenos believes that on this account Vaughn and the police must pay him damages. We will assume that the procedure of attesting the signature out of the presence of the witness violates state law. It does not matter. In a suit under §1983 the plaintiff must show a violation of the Constitution or laws of the United States, not just

a violation of state law. The two are not the same. E.g., *Carson v. Block*, 790 F.2d 562, 565 (7th Cir. 1986) (collecting cases); *McKinney v. George*, 726 F.2d 1183, 1188-89 (7th Cir. 1984) (holding that a warrantless arrest on probable cause does not violate the fourth amendment even if state law required the police to have prior authorization). No principle of federal law makes a properly attested complaint necessary to an arrest or a criminal prosecution. Police often arrest suspects on the basis of oral reports from witnesses, and the state may prosecute against the wishes of all witnesses.

Gramenos states that: "The failure to file a valid complaint, in of [sic] itself, establishes a violation of §1983 [sic]. *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977); *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975)." Neither case says anything like this. The complaint in *Smith* was irregular, but the violation of the Constitution was that the police arrested a suspect without either a valid complaint (the witness signed a blank piece of paper) or any knowledge of the facts. As the court put it, the police "depended on the conclusory assessment of the store officers. These store managers, in turn, did not have probable cause for believing that McClure was a shoplifter and that Smith was an accomplice." 519 F.2d at 94. In *Duriso* the complaint was *properly* signed, and it was this complaint that furnished the basis for concluding that the complaining witness knowingly made a false charge under color of state law. 559 F.2d at 1277-78. In both *Smith* and *Duriso* the constitutional problem was the lack of probable cause to make an arrest. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1349 (7th. Cir. 1985), on which Gramenos relies for assistance on every other issue in the case, states: "this court once again notes that an alleged violation of a state statute does not give rise to a corresponding §1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution." Gramenos does not even try to explain how his position can be reconciled with *Moore*.

Gramenos insists, however, that the Supreme Court has held that violations of state law also violate the Constitution. The brief cites *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and *Davis v. Scherer*, 468 U.S. 183 (1984). The question in *Harlow* was one of immunity, and the Court said that officials are immune from liability in damages for the violation "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. A rule that a clear violation of statute will remove an immunity—because the statute gives notice of the conduct required, so that the defendant cannot say that the norm took him by surprise—is a far cry from saying that the violation of a statute is itself a violation of the Constitution. *Davis* then holds that violations of statutes generally do *not* dissipate immunity, stating: "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." 468 U.S. at 194. A footnote continues: "Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon." 468 U.S. at 194 n.12. The statute involved in this case is not a statute of the United States, the violation of which would be actionable under §1983.

II

Gramenos accuses Jewel, Vaughn, and the police of conspiring to deprive him of his constitutional rights. There are two problems. One, which applies to all defendants, is that the claim assumes a deprivation of rights—an arrest that is unreasonable within the meaning of the fourth amendment, now applicable to the states through the fourteenth. If the arrest was constitutionally unreasonable, then the police are liable under §1983 without regard to the "conspiracy", and if not, not. We defer to Part IV the discussion whether the arrest was supported by probable cause. The other problem, which applies to Jewel and

Vaughn, is that the Constitution applies only to governmental actors. Gramenos does not contend that one who accuses someone else of a crime is exercising the powers of the state. A private party comes within §1983 only when "he is a willful participant in joint action with the State or its agents. . . . Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the [state]." *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). Although private parties call on the aid of state law "without the grounds to do so", when the private decision may "in no way be attributed to a state rule or a state decision" (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 940 (1982)), the private parties are not state actors. There must be a conspiracy, an agreement on a joint course of action in which the private party and the state have a common goal. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

Adickes, the last in a line of cases in which restaurateurs and others used the trespass or vagrancy laws to enforce racial segregation long after it became clear that the state may not discriminate on account of race, has become the basis for a rule that shopkeepers are engaged in "state action" when they strike a deal with the police under which the police simply carry out the shopkeepers' directions. If the police promise to arrest anyone the shopkeeper designates, then the shopkeeper is exercising the state's function and is treated as if he were the state. This approach is the basis for the finding of state action in *Duriso* and *Smith* and, among many other cases, *Moore v. Marketplace Restaurant*, 754 F.2d at 1352-53; *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *vacated in part*, 106 S. Ct. 40 (1985); and *Davis v. Carson Pirie Scott & Co.*, 530 F. Supp. 799 (N.D. Ill. 1982). But if the shopkeeper is operating independently, his conduct is judged under the state tort law (false arrest, malicious prosecution, slander, and the like) rather than the fourth amendment. Cf. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149

(1978). The parties agree on these principles but disagree about their application to this case.

Gramenos took the deposition of every significant actor in the case. Each denied that there was any arrangement, plan, or scheme under which the police would arrest anyone Jewel wanted arrested. Gramenos did not present any evidence to pierce these denials—such as evidence that the police have arrested everyone Jewel wanted arrested in the past. The police stated that they had not arrested anyone at Vaughn's request before, so it is not possible to conclude that Vaughn had struck his own bargain with them. A party may not cry "conspiracy" and throw himself on the jury's mercy. Even if the jury should disbelieve all the denials, this would leave Gramenos with no evidence. There must be a genuine dispute about a material fact. *Anderson v. Liberty Lobby, Inc.*, 54 L.W. 4755, 4758-60 (U.S. June 25, 1986). A jury in this case could come out only one way.

There are three bits of evidence on which Gramenos seizes. First, Jewel kept printed complaint forms in its stores. Its employees filled these out when they caught shoplifters. Second, the "Chief of Loss Prevention" of Jewel stated that Jewel left its guards with full discretion to decide when to let a suspect go and when to "lock him up." Third, officer Cosgrove stated that "if the Jewel wanted the individual arrested, we would arrest him." The supermarket's use of preprinted forms does not show that the police and Jewel entered into a plan of any kind. The store keeps the forms for its own convenience. Shoplifting is common; it makes sense for a store to have a stock of forms whether or not the store has an agreement with the police. The two statements, read in context, do not show that Jewel and the police had a standing arrangement; the chief of loss prevention, like officer Cosgrove and everyone else, denied it. The point of each statement was that the guard in the store had discretion to decide whether to let the suspect go or press charges. If the guard thought the evidence weak, neither Jewel's management nor the police would question a decision to

drop things then and there. If the guard thought the evidence strong, then the police had to decide what to do. A party cannot resist summary judgment by pointing to snippets of depositions when the point of *every* witness's statement was that there was no agreement, and the police exercised independent judgment. They may have exercised poor judgment (a subject to which we return), but they exercised judgment. Plausible inferences must be resolved in favor of the party opposing summary judgment, but the inferences Gramenos presses on us are not plausible. A verdict by the jury for Gramenos would have to be set aside. The evidence of conspiracy here is weaker than the evidence in *Moore*, 754 F.2d at 1352-53, a case in which the defendants received summary judgment.

III

The police held Gramenos between 11:55 p.m., when they left the store, and 4:15 a.m., when they allowed him to post $100 and go. They did not take him before a magistrate. He seeks compensation for what he says is excessive detention. The magistrate did not discuss this claim, and the police respond to it only by pointing out that they need to do a lot of things after an arrest—take fingerprints and mug shots, check for outstanding warrants, fill out countless forms. One difficulty is that none of the evidence in this case quantifies the amount of time it would take reasonably diligent officers to complete these tasks. Another is that there is some evidence that the police held Gramenos out of spite—or perhaps to impose the real punishment for shoplifting, see Malcolm M. Feeley, *The Process is the Punishment* (1979)—rather than out of a need to complete essential tasks. When Gramenos arrived at the stationhouse he asked to be released on bond. He states that officer Schmit replied: "Counsel, we are going to keep you here for four hours."

"[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention

to take the administrative steps incident to arrest." *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975). When the "administrative steps" have been completed, the police must take the suspect before a magistrate to establish probable cause, or they must let him go. The Court has never said how long the "brief period" may be. The American Law Institute thinks that two hours are enough. *Model Code of Pre-Arraignment Procedure* §130.2(1) (1975). We held in *Moore*, 754 F.2d at 1350-52, that four hours requires explanation. This case is in essentially the same posture as *Moore*: an unexplained four hours of detention in the dead of night. It must be remanded for further proceedings.

It is premature to say how long is too long under the fourth amendment. On remand the police should explain what must be done after an arrest for shoplifting and why reasonably diligent officers need more than four hours to do it. The court also should determine whether four hours is an acceptable period for a non-violent misdemeanor. If the police choose to perform time-consuming tasks after an arrest, perhaps they must do so on their own time rather than the suspect's, issuing a citation rather than keeping the suspect locked up in the interim.

IV

Whether summary judgment is proper on the question whether the police were entitled to arrest Gramenos is the most difficult issue in the case. When Schmit and Cosgrove arrived at the store, Vaughn told them that he had seen Gramenos put items in his pocket, pass through the checkout line (paying for other items), and try to leave the store. Vaughn intercepted Gramenos on his way out, and, according to Vaughn, Gramenos then took off through the aisles, emptying his pockets. Vaughn displayed the items to the officers, saying that he and a stockboy had collected them. Gramenos conceded touring the aisles at a good clip (he says it was a fast walk) but denied removing things from his pockets or having anything that

needed to be removed. Gramenos states that at this point the police took him into custody, believing Vaughn's story over his. This is not probable cause, Gramenos asserts, because the police bypassed an opportunity to interview the stockboy and shoppers to determine who was telling the truth.

In depositions the police stated that they had interviewed the stockboy and two customers, who corroborated Vaughn's tale. Two shoppers also gave depositions, each stating that he had talked with the police and had seen Gramenos do suspicious things. The magistrate stated that "it is uncontradicted that the officers did independently interview and investigate the facts" and concluded, on this ground, that they had probable cause. This is not correct; Gramenos contradicts the officers' claim that they interviewed other witnesses. Although Gramenos was under restraint and therefore could not observe everything the police did, he offered some reasons that might lead a jury to conclude that the other shoppers had mistaken his arrest for that of some other person. The arrest report the officers filled out at the time does not mention witnesses other than Vaughn. Affidavits filed by the officers also state that the arrest was made on Vaughn's complaint and omit mention of other witnesses. And each of the two shoppers' descriptions of the arrest differs from what Gramenos and Vaughn agree occurred. One shopper, for example, said that he saw a white security guard escort Gramenos to an office and remove merchandise from his pocket; later the police took Gramenos away on a paddy wagon. Vaughn is black; no one else thinks that Gramenos had merchandise in his pocket when he reached the office; the merchandise this shopper recalls is not the kind Gramenos is accused of stealing; and the police left in a cruiser, not a paddy wagon. The second shopper stated that at the time she saw Gramenos in the Jewel store she was pregnant with her first child; the date on which she gave birth precludes her pregnancy at the time Gramenos was arrested. Now a jury might believe that this shopper was mistaken about her pregnancy rather

than her observation of the incident, as a jury might believe that the first shopper saw the incident but had trouble remembering the details. Eyewitness descriptions are notoriously full of inaccuracies. Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, 3 *Crime and Justice: An Annual Review of Research* 105 (1981). These are not the sort of issues that may be resolved on summary judgment, however.

We therefore take only the facts on which there is no genuine dispute. Vaughn, a store guard, told the police that he saw Gramenos put items in his pocket and try to leave the store with them, and that Gramenos ran wildly through the aisles scattering food after being confronted. Vaughn filled out a criminal complaint and signed it in the presence of the two officers. Gramenos denied everything (except walking quickly through the aisles). The police interviewed no one else and took Gramenos away. Did they have probable cause?

Two of our recent cases hold that the existence of probable cause is a question for the jury in a damages suit "if there is room for a difference of opinion." *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc); *Moore*, 754 F.2d at 1344-47. Probable cause can be a matter of degree, varying with both the need for prompt action and the quality of the information at hand. *Illinois v. Gates*, 462 U.S. 213, 235, 238-39 (1983); *Llaguno*, 763 F.2d 1564-66. There are many formulae for "probable cause" or "reasonable suspicion" but all speak of the exercise of judgment, of decisions "turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. This certainly sounds like the territory of the jury, leaving that body to determine probable cause and calling on the officer to pay damages unless he makes out a defense of immunity, perhaps under the rubric "probable cause to believe there was probable cause." See *Malley v. Briggs*, 106 S. Ct. 1092, 1098 (1986).

Yet we hesitate to conclude that 195 years after the fourth amendment was added to the Constitution there

must be a jury trial every time the police arrest a person accused by a store guard who says he saw the person shoplifting, a trial in which the jury will decide whether the police used the right investigative techniques. Each jury will have its own view of appropriate investigation, and the burden of trials will be a substantial tax on police for the privilege of doing their already difficult jobs. *Llaguno* and *Moore* were unusual cases, and they do not establish that every acquitted defendant is entitled to a trial on whether he should have been arrested. See *Williams v. Kobel, supra.* Both *Llaguno* and *Moore* involved warrantless entries into dwellings looking for suspects. The search in *Moore* was late at night, and the police lacked good information that a crime had been committed. There had been a dispute about the size of a bill in a restaurant, and whether this was a theft of service or a contract dispute was hard to tell. A jury might conclude that a nighttime arrest for an incident that may not have been a crime was unreasonable—and "reasonableness" is the central command of the fourth amendment. More generally, *Llaguno* and *Moore* merge the concepts of probable cause and reasonableness. This is sometimes inevitable, given the flexible quality of probable cause (which is less than a rule of more-likely-than-not, but how much less depends on the circumstances). See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment,* 45 U. Pitt. L. Rev. 227, 236-41, 243-56 (1984). The question is not always open-ended, however, and it may be possible to have an understandable definition of probable cause even though "reasonableness" remains as a separate issue. We think a separation is useful here, when the question concerns the sufficiency of the evidence to make an arrest in a public place. See *United States v. Watson,* 423 U.S. 411 (1976).

Vaughn was an eyewitness. The facts he related to the police (if he told the truth) establish a crime. Vaughn said that Gramenos had passed the checkout counter and was about to leave the store. Gramenos's identity was not in dispute. In Illinois the report of an eyewitness to a crime

is sufficient to authorize an arrest. E.g., *People v. Foss*, 18 Ill. App. 3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974). The Supreme Court has not spoken on the question, but the formulae for probable cause, such as "a probability or substantial chance of criminal activity, not an actual showing of such activity", *Gates*, 462 U.S. at 244 n.13, quoted in *New York v. P.J. Video, Inc.*, 106 S. Ct. 1610, 1616 (1986), or "facts and circumstances known to the officer [that] warrant a prudent man in believing that an offense has been committed", *Henry v. United States*, 361 U.S. 98, 102 (1959), do not suggest that an officer risks his career and his fortune by believing an apparently sober eyewitness to a crime. A "prudent" officer may balk if the person claiming to be an eyewitness strolls into the police station and describes a crime from long ago, or if the person leveling the accusation is babbling or inconsistent. When an officer has "received his information from some person—normally the putative victim or an eye witness—who it seems reasonable to believe is telling the truth", *Daniels v. United States*, 393 F.2d 359, 361 (D.C. Cir. 1968), he has probable cause. Probable cause does not depend on the witness turning out to have been right; it's what the police know, not whether they know the truth, that matters. For example, *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984), held that a witness's complaint established probable cause as a matter of law, making a trial unnecessary. As the Eighth Circuit remarked in finding probable cause despite an officer's failure to conduct an investigation (even to look at the bill said to be counterfeit): "There is no constitutional or statutory requirement that before an arrest can be made the police must conduct a trial." *Morrison v. United States*, 491 F.2d 344, 346 (8th Cir. 1974). "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). See also 1 Wayne R. LaFave, *Search and Seizure* §3.2 (1978).

Police have reasonable grounds to believe a guard at a supermarket. We need not say that police always are entitled to act on the complaint of an eyewitness; a guard is not just any eyewitness. The chance that the complainant is pursuing a grudge, a risk in believing an unknown witness, is small in an institutional setting. The guard who pursues a private agenda may be fired and disgraced; there are automatic penalties that the police are entitled to consider. Cf. *Model Code of Pre-Arraignment Procedure* at 297-303. The store will insist that guards err on the side of caution. It does not want to embarrass and anger an honest customer—not only because this is bad for business but also because a false charge of crime may lead to costly tort litigation under state law. Jewel Companies is not judgment-proof; its self-interest protects shoppers from unsubstantiated charges, and the police are entitled to consider this, too. The question is whether they have reasonable grounds on which to act, not whether it was reasonable to conduct a further investigation. Cf. *United States v. Edwards*, 415 U.S. 800, 807 (1974).

Some parallel rules suggest that one reliable eyewitness is enough. Even before *Gates*, a single tipster could supply probable cause to issue a search or arrest warrant, if the police had reason to think that the informant had first-hand knowledge and was reliable. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); both overruled (in favor of a lower standard of probable cause) by *Gates*. The opinions in *Aguilar* and *Spinelli* take it as a point of departure that the report of one identified, reliable eyewitness creates probable cause. The Court has never suggested that the police, with such information in hand, must conduct a further investigation or put contradictory evidence into the affidavit. Cf. *Franks v. Delaware*, 438 U.S. 154 (1978), holding that if an affidavit is sufficient on its face the defendant may not try to undercut the finding of probable cause by introducing other facts that the police left out, indeed that he may not even controvert the facts in the affidavit, unless he first shows that the author of the affidavit knew them

to be untrue and that without these facts the affidavit would not establish probable cause.

Just as a single eyewitness's statement—without further investigation or a narration of contrary evidence—can support a warrant, so a single eyewitness's statement can support an indictment and a conviction. If the state had chosen to indict Gramenos, it could have done so on the basis of Vaughn's testimony without offering Gramenos any opportunity to rebut the testimony and without telling the grand jury anything more. And if the judge at trial had chosen to believe Vaughn over Gramenos, that would have been sufficient to support a conviction "beyond a reasonable doubt." It would be passing strange if the evidence sufficient to establish guilt at trial were not enough to make an arrest. The trial gives extra safeguards, such as the right to cross-examine Vaughn and present evidence in reply, that enable the trier of fact to assess Vaughn's story more fully than the officers did on the scene, but the stakes at trial are also greater. The stakes in an arrest, in addition to the sheer embarrassment of it all, are whether the police may hold the suspect for the "brief period" (*Gerstein*, 420 U.S. at 114) necessary to handle housekeeping and get the suspect before a magistrate, and the level of inquiry is correspondingly lower. Cf. *United States v. Sharpe*, 105 S. Ct. 1568 (1985) (a detention of 20 minutes, perhaps more, may be justified on suspicion falling short of probable cause).

The police may discover, to their dismay, that when they do not conduct an investigation they cannot get a conviction. The uncorroborated testimony of Vaughn did not carry the day at trial. If the two shoppers and the stockboy had testified, things might have come out differently. But the fourth amendment does not define as probable cause whatever good police practice requires, or whatever proves necessary to prevail at trial. A rule under which a single eyewitness's report can be probable cause does not induce the police to make careless arrests; their own concern for their reputations as producers of good cases will lead them to do more as a rule—as the officers say they did more in this case.

One more consideration supports the conclusion that the report of an eyewitness who has good reasons to tell the truth furnishes probable cause: that "probable cause" is not always sufficient to make an arrest. "Probable cause" appears in the fourth amendment only as a requirement for a warrant. The general rule, in the first clause of the amendment, is that "[t]he right of the people, to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated". Probable cause, a soundly-based belief that the suspect may have committed a crime, is only one component of the "reasonableness" of arresting and detaining a person. When the arrest for a felony occurs in a public place in the daytime, probable cause is the only question. *United States v. Watson, supra*; see also *United States v. Santana*, 427 U.S. 38 (1976). Even then the police may hold the suspect only for a "brief period" (*Gerstein*, 420 U.S. at 114) pending presentation of the case to a judicial officer. When the arrest requires the use of deadly force, probable cause is not sufficient. *Tennessee v. Garner*, 105 S. Ct. 1694 (1985). When the arrest takes place in a home, the police officer's assessment of probable cause ordinarily is not sufficient; the officer must get a warrant unless the circumstances are exigent. *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980). When the arrest (or any other seizure) takes place in a private place at night, the police ordinarily must meet an elevated standard (be "positive") and perhaps establish a special need for haste or stealth. Fed. R. Crim. P. 41(c)(1); *Gooding v. United States*, 416 U.S. 430, 455-58 (1974); *Jones v. United States*, 357 U.S. 493, 498 (1958).

The common law contains one more limit, a constraint of special pertinence here: an officer may make a custodial arrest for a misdemeanor only if the crime was committed in his presence. See Wayne R. LaFave, *Arrest: The Decision to Take a Suspect into Custody* 17-30 (1965), for a description of the common law and its limits. The rule reflects a widely-held belief that misdemeanors should be prosecuted by citation unless the officer has seen the crime committed, which greatly reduces the chance of

mistaken arrest. Those stopped for misdemeanors such as traffic offenses usually are cited and released on the spot after posting bond. Most reports of misdemeanors will not produce a sentence of custody (as opposed to a fine or probation), so a custodial arrest itself becomes a substantial part of the penalty. The Supreme Court has bypassed opportunities to decide whether the common law rule is part of the fourth amendment, see *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). In deciding other questions under the fourth amendment, however, the Court has found the historical practice a useful guide. E.g., *Edwards*, 415 U.S. at 804 n.6; *Watson*, 423 U.S. at 418-22; *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977). Searches must be "reasonable", but "reasonable" may be a term of legal art defined by history and not an invitation to modern invention; when the term has a developed meaning, it controls the course of decision.

Illinois is among the states that have altered the common law rule. It allows a full custodial arrest for any crime on probable cause. Ill. Rev. Stat. ch. 38 §107-2(c). See also *Model Code of Pre-Arraignment Procedure* 692-95 (collecting statutes in other jurisdictions). The A.L.I. recommends a statute allowing a custodial arrest for a misdemeanor if the officer has reasonable cause to believe that the suspect will not appear in response to a summons or will injure himself or others. *Model Code* §120.1(1)(b) and commentary at 289-90. Given the statute in Illinois, and the principles of official immunity in *Pierson v. Ray*, *supra*, and their enlargement in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the officers' decision to arrest Gramenos cannot be the basis for an award of damages, if there was probable cause. Cf. *Michigan v. DeFilippo*, 443 U.S. 31 (1979). We are not authorized to decide in this case whether the statute abrogating the common law rule—without putting equivalent guarantees of reasonable conduct in its place—comports with the fourth amendment. But this discussion is not a detour. It is important to understand that "probable cause" is not always the same thing as "reasonable" conduct by

the police, and that one reason why it is appropriate to treat the statement of an apparently reputable eyewitness as probable cause is that other rules potentially affect the propriety of making an arrest on this information.

Gramenos does not challenge the "reasonableness" of his arrest if there is probable cause, and he does not seek relief against the operation of the Illinois statute authorizing misdemeanor arrests on probable cause. It is not appropriate to read every element of constitutional "reasonableness" back into the term "probable cause". These terms serve distinct functions, which are lost by a homogenization of the legal vocabulary. We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices. There is a gap, often a wide one, between the wise and the compulsory. To collapse those two concepts is to put the judicial branch in general superintendence of the daily operation of government, which neither the fourth amendment nor any other part of the Constitution contemplates.

The judgment is affirmed, except that the portion granting summary judgment on the claim of excessive detention is vacated, and the case is remanded for further proceedings consistent with Part III of this opinion. Jewel and Vaughn shall recover their costs. Gramenos and the police officers shall bear their own costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 25, 1986.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

JAMES N. GRAMENOS, *Plaintiff-Appellant,*
No. 85-2767 vs.
JEWEL TEA Co., et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 C 709—**John A. Nordberg**, *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is AFFIRMED, except that the portion granting summary judgment on the claim of excessive detention is VACATED, and the case is REMANDED for further proceedings consistent with Part III of the opinion. Jewel and Vaughn shall recover their costs. Gramenos and the police officers shall bear their own costs.

* The Honorable William J. Campbell, of the Northern District of Illinois, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 29, 1986.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 85-2767

JAMES N. GRAMENOS,

Plaintiff-Appellant,

v.

JEWEL COMPANIES, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 81 C 709—**John A. Nordberg,** *Judge.*

ORDER

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on August 8, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

---

* Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

September 11, 1985

Judge Nordberg No. 81 C 709

Gramenos -v- Jewel Tea Co., et al.

* * * * *

DOCKET ENTRY: Having reviewed the pleadings and briefs of the parties and the Report & Recommendation of the Magistrate dated June 25, 1985, the court adopts the Report and Recommendation of the Magistrate and hereby grants defendants' motion for summary judgment.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES N. GRAMENOS,

Plaintiff,

No. 81 C 709 v.

JEWEL TEA CO., et al.,

Defendants.

TO: HONORABLE JOHN A. NORDBERG, JUDGE
UNITED STATES DISTRICT COURT

HONORABLE SIR:

REPORT AND RECOMMENDATION
of Magistrate James T. Balog

Before the court are the separate motions of the Defendants for summary judgment and motions to strike the Plaintiff's Exhibits in his Reply Memorandum in Opposition to Summary Judgment.

The facts of this case arise out of the arrest of the Plaintiff, James N. Gramenos ("Gramenos") for attempted retail theft. On February 12, 1980, the Plaintiff was shopping in a store owned by the Defendant Jewel Tea Co. ("Jewel"), located at 1210 North Clark Street in Chicago. At approximately 11:30 p.m., the Defendant Johnny Vaughn ("Vaughn"), a security officer for Jewel, stated that he observed the Plaintiff place merchandise in his coat pocket. (Defendant's Reply Memorandum in Support of Summary

Judgment, Ex. 1 at 6).[1] Vaughn stated that he observed the Plaintiff pay for other merchandise at the check-out counter, but that he had not paid for the items Vaughn saw him put and keep in his coat pocket. After the Plaintiff had passed the last point where he could have paid for the merchandise, Vaughn approached the Plaintiff, identified himself as a security guard and asked the Plaintiff to step into the Security Room. (*Id.* at 7-8). The Plaintiff allegedly began screaming, ran back into the store, throwing the items out of his coat pocket as he ran. (*Id.* at 8). The items were later identified as two tubes of toothpaste, jello and a jar of baby food.

Vaughn then took Plaintiff into the Security Room and called the Chicago police. Defendant, Officer Frank Cosgrove ("Cosgrove") and Defendant, Officer Joseph Schmit ("Schmit") responded to the call. After allegedly interviewing several Jewel employees and other witnesses, the Defendants Cosgrove and Schmit placed the Plaintiff under arrest. (*See* Defendant's Memorandum in Support of Summary Judgment, Ex. 6). Based upon these events, criminal charges were brought against the Plaintiff in the Circuit Court of Cook County. At the close of the State's evidence in the criminal trial, a directed verdict was granted in favor of Gramenos. *Id.*, Ex. 1 at 31.

Pursuant to the arrest, the Defendant Vaughn signed a complaint against Gramenos. On the complaint, it states that the complainant's signature was subscribed and sworn to before the Defendant, Sergeant Heatly ("Heatly"). The Plaintiff maintains that Vaughn never appeared before

[1] Exhibit 1 is a transcript of the criminal proceedings in the Circuit Court of Cook County.

Heatly, therefore the complaint violated Ill.Rev.Stat., ch. 38, § 111-3(b).[2]

The Plaintiff claims that his prosecution by an improperly verified complaint violates his right to due process of law under the Fourteenth Amendment and that this gives rise to an action under 42 U.S.C. § 1983. (Plaintiff's Amended Complaint, Count I). The Plaintiff also alleges the Defendant police officer did not have probable cause to arrest him since they did not conduct an independent investigation. The Plaintiff further alleges that the police subjected him to an unreasonable search and seizure and that they deprived him of his property without due process of law.

As a separate cause of action against Jewel and Vaughn under § 1983, the Plaintiff alleges that the practice of signing a complaint without appearing in person indicates "the existence of a concerted and customary plan of action whereby Defendant Jewel is permitted by the Chicago Police Department to cause the arrest and prosecution of suspected shoplifters without the necessity of complying with procedur(al) safeguards ordinarily required in such circumstances." (Plaintiff's Amended Complaint, ¶ 22).

The Plaintiff seeks judgments against the three members of the Chicago Police Department for $100,000 and against Jewel and Vaughn for $100,000.

I. MOTION FOR SUMMARY JUDGMENT.

Summary judgment shall not be granted unless the record reveals "that there is no genuine issue of material

---

[2] This section requires a criminal complaint "to be sworn to and signed by the complainant."

fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden of showing the propriety of summary judgment relief rests with the movant. *First Nat'l Bank Co. of Clinton, Illinois v. Insurance Co. of North America*, 606 F.2d 760 (7th Cir. 1979). All inferences that may be drawn from the evidence shall be drawn in favor of the party against whom summary judgment relief is sought. *Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 (7th Cir. 1976). When, however, a summary judgment movant has made a threshold showing of the propriety of summary judgment, the adverse party may not defeat the motion by merely relying upon the allegations or denials of his pleadings. Fed.R.Civ.P. 56(e); *First National Bank*, 606 F.2d at 767.

II. IMPROPER VERIFICATION OF THE COMPLAINT.

Even though the complaint against the Plaintiff in the criminal action may have been improperly verified, the Plaintiff has failed to show that this is a federal constitutional right cognizable under § 1983 action. The Illinois Supreme Court has specifically held that there is no constitutional requirement for verification of a complaint. *See People v. Audi*, 75 Ill.2d 535, 537, 389 N.E.2d 534 (1979); *People v. Harding*, 34 Ill.2d 475, 481-82, 216 N.E.2d 147 (1966). Further, the requirement that the complaint be sworn to and signed by the complainant can be waived and is waived by proceeding to trial. *People v. Bradford*, 62 Ill.2d 21, 22, 388 N.E.2d 182 (1975).[3] In the case at

[3] "We therefore find that the Defendant by proceeding to trial without objecting or raising the question waived any defects that allegedly existed in the verification of the complaint." *Bradford* at 22.

bar, the Plaintiff did not object to the improper verification of the complaint until after the close of the State's evidence, thereby waiving any defects. (Defendant's Memorandum in Support of Summary Judgment, Ex. 1 at 31).

Further, as the Defendants indicate, the purpose of the complaint is to give notice to the Defendant of the nature and elements of the crime charged in order to enable the Defendant to properly present a defense. *See People v. Puleo*, 96 Ill.App.3d 457, 421 N.E.2d 367 (1st Dist. 1981). There is no argument that the Plaintiff was not aware of the exact nature of the charges against him or that he could not properly present a defense. Thus, the Plaintiff has failed to establish that the allegedly improper verification deprived him of any federally protected constitutional rights.

III. PROBABLE CAUSE FOR THE ARREST.

The Plaintiff spends over fifty pages in his reply brief discussing his apparent belief that the Defendants did not have probable cause to arrest him. Although it is not specifically alleged in his amended complaint, apparently his argument is that his arrest was based solely upon the form complaint signed by Vaughn. The Plaintiff alleges that this was insufficient to establish probable cause violating his Fourth Amendment rights.

Plaintiff's claim is unfounded. Probable cause to arrest may be found upon the observations of the party signing the complaint alone. *See, e.g., People v. Foss*, 18 Ill.App.3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974). However, in the case at bar, it is uncontradicted that the police officers conducted an independent investigation to determine whether there was probable cause to arrest the Plaintiff. Two shoppers at Jewel stated by deposition that they saw

Gramenos place merchandise in his coat pocket and that they later gave statements to officers Schmitt and Cosgrove. (Defendants' Memorandum in Support of Summary Judgment, Ex. 7 & 8). Despite the fact that there may be some discrepancies in the depositions of the various witnesses and officers, it is uncontradicted that the officers did independently interview and investigate the facts leading to Plaintiff's arrest. Since there was probable cause for the arrest, the search and seizure of the Plaintiff was not unreasonable.

IV. COUNT II—§ 1983 ACTION AGAINST JEWEL AND VAUGHN.

Ordinarily § 1983 actions may not lie against private parties, such as Jewel and Vaughn, but only against state agents acting under color of state law. The only exception to this rule is when private citizens enter into a concerted action with state officers to bring about a specific chain of events. *See, e.g., Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 156 (1978).

Courts have found state action when private security guards act in concert with police officers or pursuant to customary procedures agreed to by police departments. *See El Fundi v. Deroche,* 625 F.2d 195, 196 (8th Cir. 1980); *Smith v. Brookshire Bros., Inc.,* 519 F.2d 93 (5th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976); *Duriso v. K-Mart,* 559 F.2d 1274 (5th Cir. 1977).

However, to find state action, the merchant must act in accordance with a pre-existing plan between merchant and police, and the plan's context must involve the merchant's exercise of functions exclusively reserved to the State. *Klimzak v. City of Chicago,* 539 F.Supp. 221, 223 (N.D. Ill. 1982); *Davis v. Carson Pirie Scott & Co.,* 530

F.Supp. 799 (1982). Where the police conduct an investigation following private complaints, the private complainant is not a state actor. *Davis* at 802. Further, mere arrest after detention by store detectives will not suffice to constitute state action. *Id.*

In the case at bar, it has already been established that the police conducted an independent investigation. As the court noted in *Davis*, "a 'customary practice' of police investigation following private complaints clearly does not make the private complainant a state actor." *Id.*

The Plaintiff's unsupported allegations may not survive a motion for summary judgment. *See First Nat'l Bank Co. of Clinton, Ill. v. Insurance Co. of North America*, 606 F.2d 760, 767 (7th Cir. 1979). Further, the Plaintiff's unverified exhibits attached to his reply memorandum do not raise a genuine issue of material fact.[3] The exhibits totally fail to show any existence of a plan between the Defendants whereby the merchant exercised functions exclusively reserved to the State.

For the reasons stated herein, IT IS RECOMMENDED that the court GRANT the Defendants' motions for summary judgment.

Respectfully submitted,

/s/ JAMES T. BALOG
United States Magistrate

DATE: JUNE 25, 1985.

---

[3] Because it has been recommended that the court grant summary judgment, it need not rule upon the Defendants' motions to strike.

The parties may serve and file written objections to this Report and Recommendation within ten (10) days hereof.

Copies have, this date, been mailed to:

JAMES A. STAMOS
69 West Washington Street
Chicago, Illinois 60602
Attorney for Plaintiff

FREDERICK J. GROSSMAN
5400 Sears Tower
Chicago, Illinois 60606
Attorney for Jewel Tea Co.
and Johnny Vaughn (Defendants)

STANLEY GARBER
City of Chicago
Law Department
121 North LaSalle Street
Room 511, City Hall
Chicago, Illinois 60602
Attorney for Defendants
Schmit and Cosgrove

DARKA PAPUSHKEWYCH
Asst. Corp. Counsel
Room 511, City Hall
121 North LaSalle Street
Chicago, Illinois 60602
Attorney for Defendant

40-4 (Court Branch) 27-Feb. 80. (Court Date)

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

CCMC1-225 MISDEMEANOR

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

The People of the State of Illinois
Plaintiff

COMPLAINT

v.

No. _____

JAMES GROMENOS
Defendant

(AGENT FOR JEWEL FOOD INC) complainant, now appears before
(Complainant's Name Printed or Typed)

The Circuit Court of Cook County and states that

JAMES GROMENOS (defendant) has, on or about

12-FEB 80 (date) at 1210 N CLARK (place of offense)

committed the offense of RETAIL THEFT in that he

KNOWINGLY TOOK POSSESION OF, AND CARRIED AWAY MERCHANDISE DISPLAYED, HELD, STORED OR OFFERED FOR SALE IN A RETAIL MERCANTILE ESTABLISMENT JEWEL FOOD, WITH THE INTENTION OF RETAINING SUCH MERCHANDISE WITH THE INTENTION OF DEPRIVING SAID JEWEL FOOD INC PERMANENTLY OF THE POSSESSION, USE OR BENEFIT OF SUCH MERCHANDIS WITHOUT PAYING.

in violation of Chapter 38 Section 16A-3.

ILLINOIS REVISED STATUTES

/ Johnny Vaughn A-IR
(Complainant's Signature)

1210 N CLARK (Complainant's Address) 944-6950 (Telephone No.)

STATE OF ILLINOIS)
COUNTY OF COOK) ss.

JOHNNY VAUGHN
(Complainant's Name Printed or Typed)

being first duly sworn, on HIS oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

Johnny Vaughn
(Complainant's Signature)

Subscribed and sworn to before me 12-Feb. 19 80.

_____
(Judge or Clerk)

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probable cause for filing same. Leave is given to file said complaint.

Summons issued, Judge _____
or
Warrant Issued, Bail set at _____
Judge _____

or
Bail set at _____

85-2767
United States
Court of Appeals
Plaintiff's
EXHIBIT #1.
(Record 38 Ex. 1).

No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS JEWEL COMPANIES, INC. AND JOHNNY VAUGHN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES T. FERRINI *
PAUL D. SHELDON
CLAUSEN MILLER GORMAN
CAFFREY & WITOUS, P.C.
5400 Sears Tower
Chicago, Illinois 60606
(312) 876-1900

Attorneys for Respondents Jewel Companies, Inc. and Johnny Vaughn

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1) Whether there is a "conflict" among authorities warranting review by this Court merely because courts reach different results based upon different facts, while applying identical principles of law.

2) Should certiorari be granted for the purpose of having this Court independently weigh the evidence to determine whether the Circuit Court of Appeals properly granted summary judgment to defendant in a section 1983 action where:

   —both the defendant and the police officers testified that there was no pre-conceived plan or agreement between them;

   —this testimony was uncontradicted; and

   —plaintiff's only evidence of a "pre-conceived plan" giving rise to a section 1983 action is that (1) the defendant, a national grocery store chain, kept pre-printed complaint forms on hand, and (2) police officers testified that where a private security guard employed by the defendant was an eyewitness to a shoplifting offense, signed a written complaint, and desired to press charges against the shoplifter, police would then arrest the shoplifter.

PARTIES

All parties to the appeal are listed in the caption. Further, in compliance with Rule 28.1, Jewel Companies, Inc. states that its parent corporation is American Stores, Co. and that it is presently compiling information with respect to the identity of Jewel Companies' subsidiaries and affiliates. (*See* letter to Clerk of the Court, dated December 22, 1986.)

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
ARGUMENT:	
I.	
THERE IS NO "CONFLICT" AMONG THE VARIOUS DECISIONS CITED BY PLAINTIFF; THERE ARE ONLY DIFFERENT RESULTS JUSTIFIED BY DIFFERENT FACTS	2
A. The Seventh Circuit Opinion Is Not In Conflict With Decisions From Other Circuits	2
B. The Decision At Bar Is Not "In Conflict" With Prior Decisions Of The Seventh Circuit	4
C. The Seventh Circuit Opinion Is Not In Conflict With Decisions Of This Court ...	5
D. The Seventh Circuit Opinion Is Not In Conflict With Decisions Of The Illinois Supreme Court	6
II.	
CERTIORARI SHOULD NOT BE GRANTED TO WEIGH PLAINTIFF'S EVIDENCE AGAIN; THERE WAS NO PRECONCEIVED PLAN OR AGREEMENT GIVING RISE TO A SECTION 1983 ACTION	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	PAGE
Carrasco v. Klein, 381 F.Supp. 782 (E.D.N.Y. 1974)	8
Duriso v. K-Mart, 559 F.2d 1274 (5th Cir. 1977)	2, 3
Dutton v. Roo-Mac, Inc., 100 Ill.App.3d 116, 426 N.E.2d 604 (1981)	6, 7
El Fundi v. Deroche, 625 F.2d 195 (8th Cir. 1980)	4
Illinois v. Gates, 462 U.S. 213 (1983)	2, 5
Lugar v. Edmondson Oil Co., 457 U.S. 299 (1982)	8
Lusby v. T. G. & R. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984), *cert. granted* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986)	3
Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985)	4, 5, 7
People v. Foss, 18 Ill.App.3d 496, 309 N.E.2d 677 (1974)	6
People v. Tisler, 103 Ill.2d 226, 469 N.E.2d 147 (1984)	6
Rice v. Sioux City Cemetery, 349 U.S. 70 (1954)	1, 8
Smith v. Brookshire Bros., 519 F.2d 93 (5th Cir. 1975)	3
United States v. Wiseman, 445 F.2d 792 (2nd Cir. 1971)	8

Other Authority

28 U.S.C. Rule 17.1 (1984)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR RESPONDENTS JEWEL COMPANIES, INC. AND JOHNNY VAUGHN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

This case involves no issue which merits Supreme Court review. There are no "special and compelling" reasons, as required by Rule 17.1 of this Court (28 U.S.C. Rule 17.1 (1984)), nor does the case involve principles the settlement of which is of importance to the public as distinguished from that of the parties, nor is there a "real and embarrassing" conflict of opinion between the circuit courts of appeal which would warrant such review, as stated in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954).

I.

THERE IS NO "CONFLICT" AMONG THE VARIOUS DECISIONS DECIDED BY PLAINTIFF; THERE ARE ONLY DIFFERENT RESULTS JUSTIFIED BY DIFFERENT FACTS.

The cases upon which plaintiff relies are not "in conflict" with the opinion of the circuit court below. Rather, they are cases in which *different facts* required *different results.*

A. The Seventh Circuit Opinion Is Not In Conflict With Opinions From Other Circuits.

Probable cause is a "fluid concept—turning on the assessment of probabilities and particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). In other words, whether the probable cause requirement is met in any given circumstance is dependent upon the facts of the particular case. All of the cases cited by plaintiff are factually distinguishable and are actually supportive of defendants' position. None of the cases relied on by plaintiff involve an eyewitness who signed a written complaint and who informed police of the details of what he observed, as in the instant case. (797 F.2d at 433, 437.) None of the cases involved an independent police investigation prior to the arrest, as was performed in the instant case. (797 F.2d at 437.)

In *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977), no one saw the plaintiff conceal any merchandise upon his person. Indeed, the plaintiff had left the cigarettes that he was accused of stealing on a shelf in the store, and had left the store prior to his being stopped and arrested. No stolen merchandise was found on his person during a police search. Further, there is no indication in the *Duriso* opinion that the police were told any details of

the plaintiff's conduct, nor were they apparently told anything other than to arrest the plaintiff. To the contrary, in the instant case, respondent Johnny Vaughn was an eyewitness (797 F.2d at 439), who had seen Gramenos place merchandise in his pockets (*Id.* at 433) and pass through the check-out line without paying for the merchandise (*Id.* at 439). Vaughn related these facts to the police (797 F.2d at 438, 439), and recovered the items which Gramenos had thrown from his pockets after being stopped by Vaughn (*Id.* at 433, 438).

Thus, the Fifth Circuit's holding in *Duriso* that the jury verdict was not reversible, even though there were contrary inferences to be drawn from the evidence (559 F.2d at 1278), does not place the *Duriso* decision "in conflict" with the decision in the instant case.

Similarly, in *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975), the police were not told the manner of apprehension of the plaintiffs, there was no written complaint signed before the arrest of the plaintiff, subsequent to the arrest a store officer signed a blank piece of paper in lieu of a complaint, and, most importantly, the plaintiff had not yet gone through the check-out lane when she was stopped and arrested for shoplifting. Given these facts, the Fifth Circuit found that there was no probable cause for the arrest. However, defendants respectfully submit that the Fifth Circuit would have come to a contrary conclusion if, as here, the plaintiff had passed through the check-out line without paying for the items, the police were advised as to details of plaintiff's behavior and apprehension, and a written complaint was signed prior to the arrest. (*See* 797 F.2d at 433, 437, 438, 439.)

The decision of the Tenth Circuit in *Lusby v. T. G. & R. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *cert. granted* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986), is likewise consistent with the Seventh Circuit's opinion

in the instant case. In that case, plaintiff was arrested before a complaint had been signed, and it was admitted that no independent investigation had been undertaken by police officers. Where, as here, a written complaint was signed before the arrest, and police were provided with details of the plaintiff's behavior from an eyewitness and took statements from other witnesses, defendants respectfully submit that the Tenth Circuit, applying the same principles of probable cause as were applied in the instant case, would also find that there was probable cause for arrest.

Finally, the decision of *El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980), did not involve any factual determination by the court of appeals. That case was not decided upon a motion for summary judgment, as in the instant case, but on a motion for dismissal, where, taking all the allegations contained in the complaint as true, the Eighth Circuit held only that it could not say that no set of facts could ever be proved which would entitle plaintiff to recovery. 625 F.2d at 196.

Thus, the "conflict" argued by plaintiff is non-existent. In all of these decisions, the same legal principles were applied, and were applied in the same manner. It is the difference in *facts*, not in legal principle, which give rise to the different results in the cases. The plaintiff's "conflict" argument is completely without merit.

B. The Decision At Bar Is Not "In Conflict" With Prior Decisions Of The Seventh Circuit.

Plaintiff's reliance on *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985), as being "in conflict" with the decision of the Seventh Circuit in the instant case, is erroneous. *Moore* involved a warrantless entry into a home, and there was a significant question in *Moore* as to whether the conduct of plaintiffs (walking out of a

restaurant without paying a bill for food not yet served) was a theft or merely a breach of contract dispute. *Moore*, 754 F.2d at 1345. Central to the Court's reasoning in *Moore* was that the police officers did not arrest the plaintiffs at the scene of the "crime" but traveled to plaintiffs' camp site and arrested them after asking only one question: whether they were present in the restaurant on that particular night. 754 F.2d at 1345. The opinion below in the instant case specifically pointed out these differences in *Moore*. (*See* 797 F.2d at 438.)

Again, the facts in *Moore* are completely unlike those in the case at bar, and the two cases are not "in conflict," but simply reach different results based on differing facts.

C. The Seventh Circuit Opinion Below Is Not In Conflict With Decisions Of This Court.

The lower court opinion in this case is not in conflict with *Illinois v. Gates*, 462 U.S. 213 (1983). In *Gates*, this Court abandoned the two-pronged *Aguilar* and *Spinelli* tests, in favor of the "totality of the circumstances" analysis. *See* 462 U.S. at 238. This Court described the *Gates* standard as flexible, easily applied. . . ." 462 U.S. at 239.

Plaintiff's sole argument is that the lower court's opinion in the present case is "in conflict" because it described the *Gates* standard in a parenthetical remark as a "lower standard of probable cause." However, plaintiff does not argue that a "lower" standard of probable cause was actually applied, nor does plaintiff attempt to explain in what way the standard was allegedly "lower." Indeed, the opinion of the Seventh Circuit clearly shows that the "totality of the circumstances" test was applied. (*See* 797 F.2d at 439-440.)

Plaintiff has merely seized upon *dicta* of the lower court, and cannot show this Court any "conflict."

D. The Seventh Circuit Decision Is Not In Conflict With Decisions Of The Illinois Supreme Court.

The opinion of the circuit court below is not in conflict with *People v. Tisler*, 103 Ill.2d 226, 469 N.E.2d 147 (1984). Plaintiff's quotations from *Tisler* show nothing more than that Illinois has adopted the *Gates* "totality of the circumstances" standard, which is completely consistent with the circuit court's opinion in the instant case. (*See* 797 F.2d at 438-40.)

Plaintiff tries to obfuscate the issue by pointing to two opinions of the Illinois Appellate Court which plaintiff claims are in conflict. The two decisions are not in conflict, nor are they in any way relevant to any claimed conflict between the Illinois Supreme Court and the Circuit Court of Appeals in the instant case.

Contrary to plaintiff's assertion, *People v. Foss*, 18 Ill. App.3d 496, 309 N.E.2d 677 (1974), does stand for the proposition that an eyewitness identification of the perpetrator of a crime can constitute probable cause which would support a legal arrest:

> The police officer was perfectly justified in making the arrest as the bartender stated to the police officer that she wanted to sign a complaint against the defendant for disorderly conduct and pointed the defendant out to the officer.

309 N.E.2d at 679.

The case which plaintiff cites as contrary, *Dutton v. Roo-Mac, Inc.*, 100 Ill.App.3d 116, 426 N.E.2d 604 (1981), has nothing to do with probable cause, but addressed whether the defendant had "reasonable grounds" under an Illinois statute to believe that plaintiff was committing criminal trespass to land when he returned to a restaurant from which he had been banned. The Appellate Court held that the case resolved itself into a question of credibility of

the witnesses, stating that there was "competent evidence to support the versions of both parties, but the court apparently chose to accept that of the plaintiff." 100 Ill.App. 3d at 12.

In summary, there is no conflict between the Seventh Circuit Court of Appeals opinion in the instant case and the Illinois Supreme Court. Some Illinois appellate courts have reached different results based upon different facts, but this does not constitute a "real and embarrassing" conflict, nor does it relate to any conflict between the Illinois Supreme Court and the decision in the instant case.

II.

CERTIORARI SHOULD NOT BE GRANTED TO WEIGH PLAINTIFF'S EVIDENCE AGAIN; THERE WAS NO PRECONCEIVED PLAN OR AGREEMENT GIVING RISE TO A SECTION 1983 ACTION.

Plaintiff claims no conflict among authorities with respect to his "customary" plan or agreement argument, but asks this Court to weigh the evidence anew and determine whether two pieces of evidence constitute a "customary plan". Even a cursory review of the "evidence" quickly reveals that there is no issue meriting review by this Honorable Court.

The mere fact that Johnny Vaughn signed his complaint outside the presence of the arresting officer violates no federal law or constitutionally protected right. An alleged violation of a state statute does not give rise to a corresponding Section 1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1349 (7th Cir. 1985). As noted below, Gramenos has not even tried to explain how his position can be reconciled with *Moore*. (797 F.2d at 434.) Furthermore, the cases cited by plaintiff for the broad proposi-

tion of law that an abuse of the state court system can constitute a violation of Section 1983 are both factually and procedurally distinguishable.

Carrasco v. Klein, 381 F.Supp. 782 (E.D.N.Y. 1974), and *United States v. Wiseman*, 445 F.2d 792 (2nd Cir. 1971), both involved actions by process servers, where the Second Circuit had held explicitly that service of process is an act of public power (*see Wiseman*, 445 F.2d at 796), and found that process server cases fell within a narrow class of "public function" cases. Further, the *Carrasco* decision was based on a motion to dismiss, not on a motion for summary judgment, as plaintiff would have this Court believe. *See* plaintiff's Petition, p. 25.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 299 (1982), this Court held that petitioner presented a valid cause of action under Section 1983 "insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute." 457 U.S. at 942. Thus, *Lugar* directly supports the Seventh Circuit's opinion in the case at bar.

The remainder of plaintiff's argument is based solely upon certain deposition testimony, and the Petition requests that this Court independently review that deposition testimony to decide whether the magistrate, district court, and circuit court of appeals erred in their assessment of the import of that testimony. Not only does this fail to present a question "beyond the episodic," (*see Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954)), but even a cursory review of the testimony shows the patent inadequacy of plaintiff's argument. The testimony quoted on page 26 of plaintiff's Petition means nothing more than that the police officers would arrest a suspected shoplifter where an eyewitness signed a complaint and Jewel decided to press charges, *i.e.*, "wanted the individual arrested."

The testimony recounted on page 28 of plaintiff's Petition establishes only that Mr. Gramenos was given the opportunity to pay for the articles, rather than be arrested, but declined to do so. Plaintiff's assertion that this testimony "conclusively shows that the police relied upon the Jewel security guard to tell them what to do," (plaintiff's Petition at p. 29), is a complete *non sequitur*.

In summary, there is absolutely nothing of substance in plaintiff's Petition for Certiorari. The facts contained in the record have been reviewed by the Magistrate, the District Court and the Seventh Circuit Court of Appeals, and the determination of those honorable courts that no fact question was presented by the evidence does not merit or require review by this Court.

CONCLUSION

For the reasons stated, and upon the authorities cited, defendants-respondents Jewel Companies, Inc. and Johnny Vaughn respectfully request that this Court deny the Petition for Certiorari in its entirety.

Respectfully submitted,

JAMES T. FERRINI *
PAUL D. SHELDON
CLAUSEN MILLER GORMAN
CAFFREY & WITOUS, P.C.
5400 Sears Tower
Chicago, Illinois 60606
(312) 876-1900

Attorneys for Respondents Jewel Companies, Inc. and Johnny Vaughn

* Counsel of Record

(4)

No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JUDSON H. MINER,*
Corporation Counsel of
the City of Chicago,
610 City Hall,
Chicago, Illinois 60602,
(312) 744-0468,
Attorney for Joseph Schmit, Frank Cosgrove, and Sgt. Frank Heatley, Respondents.

RUTH M. MOSCOVITCH,
Chief Assistant Corporation Counsel,
JOANNE SIMBOLI HODGE,
Assistant Corporation Counsel,
Of Counsel.

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED FOR REVIEW

Whether the court properly granted summary judgment against a claim of false arrest for shoplifting where it is undisputed that the arresting officers made the arrest after a private supermarket security guard signed a complaint and stated to the officers that he had personally witnessed the theft and had seen the plaintiff, when accosted, run back into the store and throw the stolen items onto the floor.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	ii
ARGUMENT:	
A.	
CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE FACTUAL RECORD WHERE THE DISPOSITIVE FACTS ARE UNDISPUTED AND THE CORRECT SUMMARY JUDGMENT STANDARD WAS APPLIED BELOW	2
B.	
NO CONFLICT EXISTS WITH THE SETTLED LAW OF THIS COURT OR OTHER COURTS ON THE ISSUE OF PROBABLE CAUSE	5
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	PAGE
Aguilar v. Texas, 378 U.S. 108 (1964)	5, 8
Anderson v. Liberty Lobby, Inc., 477 U.S. ____, 91 L.Ed.2d 202 (1986)	2
Beck v. Ohio, 379 U.S. 89 (1964)	10, 12
BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986) ...	11, 12

Brinegar v. United States, 338 U.S. 160 (1949) .. 7

Butler v. Goldblatt Bros., Inc., 589 F.2d 323 (7th Cir. 1978) 9

Celotex Corp. v. Catrett, 477 U.S. ____, 91 L.Ed.2d 265 (1986) 3, 4

Davis v. United States, 417 U.S. 333 (1974) ... 9

Duriso v. K-Mart No. 4195, Div. of S.S. Kresge Co., 559 F.2d 1274 (5th Cir. 1977) 13

El Fundi v. Deroche, 625 F.2d 195 (8th Cir. 1980) . 13

Gramenos v. Jewel Companies, Inc., 797 F.2d 432 (7th Cir. 1986) 3, 6, 7

Illinois v. Gates, 462 U.S. 213 (1983) 6, 7, 8

Llaguno v. Mingey, 736 F.2d 1560 (7th Cir. 1985) . 12

Lusby v. T. G. & Y. Store, Inc., 796 F.2d 1307 (10th Cir. 1986) 13

Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985) 10, 11

People v. Tisler, 103 Ill.2d 226, 469 N.E.2d 147 (1984) 14, 15

Smith v. Brookshire Brothers, Inc., 519 F.2d 93 (5th Cir. 1975) 13

Spinelli v. United States, 393 U.S. 410 (1969) ... 5, 8

United States v. Diebold, 369 U.S. 654 (1962) ... 2

No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

This case is straightforward. It concerns a garden-variety probable cause determination and raises no novel issue of law. The appellate court, in the course of its decision, discussed at length the circumstances in which police may properly arrest persons suspected of crimes. Petitioner has seized upon fragments of that discussion in an attempt

to persuade this Court that the Seventh Circuit created a new standard for probable cause in this case and that grave conflicts exist between this decision and those of other courts and of this Court. In fact, no such conflicts exist, and this case does not merit Supreme Court review.

A.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE FACTUAL RECORD WHERE THE DISPOSITIVE FACTS ARE UNDISPUTED AND THE CORRECT SUMMARY JUDGMENT STANDARD WAS APPLIED BELOW.

As a threshold matter, it is necessary to dispose of the petitioner's argument that summary judgment was improperly granted in this case because the Seventh Circuit read the record incorrectly. That is simply not a sufficient basis for review by this Court. In any case, the appellate court read the record carefully and applied the correct standard for summary judgment. Moreover, there is no need for this Court to grant certiorari to make an independent review of the entire factual history of this case because only a small number of material facts are dispositive of this case, and those facts are uncontradicted.

Petitioner has made a wealth of factual assertions in his petition for certiorari. However, the existence of a factual dispute over Gramenos' innocence, no matter how sharp the controversy, does not necessarily preclude summary judgment in this case. Rather, the dispute must be over ultimate facts *material* to the case. *United States v. Diebold*, 369 U.S. 654, 655 (1962). As this Court has recently emphasized in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. ____, 91 L.Ed.2d 202 (1986), a material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth.

Unquestionably, on the record in this case, there are many disputed issues of fact. But the Seventh Circuit, applying the standard set forth by this Court last year in *Anderson* and *Celotex Corp. v. Catrett*, 477 U.S. ____, 91 L.Ed.2d 265 (1986), found that none of these disputed facts was material. After careful review of the record, the Seventh Circuit found that the key facts were not in dispute:

> We therefore take only the facts on which there is no genuine dispute. Vaughn, a store guard, told the police that he saw Gramenos put items in his pocket and try to leave the store with them, and that Gramenos ran wildly through the aisles scattering food after being confronted. Vaughn filled out a criminal complaint and signed it in the presence of the two officers. Gramenos denied everything (except walking quickly through the aisles). The police interviewed no one else and took Gramenos away. Did they have probable cause? *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 438 (7th Cir. 1986).

(See also R. 81, Exhibits 1-4).

The matters of fact which Gramenos makes much of in his petition for certiorari are not material because they are not probative of any controlling issue. For instance, plaintiff makes the assertion that the "arresting officers refused to interview available witnesses" even though substantial evidence exists to the contrary in the statements made by two shoppers in their depositions (R. 81, Exhibit 7, Deposition of Nanci Halling, pp. 15-34; Exhibit 8, Deposition of Juan Beard, pp. 12-13). Most of the petitioner's remaining assertions are simply his side of the story of what happened on the night in question. There is a classic credibility contest here, and petitioner's factual contentions as to his innocence were certainly highly relevant and material to the ultimate determination of

truth in the criminal trial he received on the charge of shoplifting. However, for purposes of false arrest, the issue is whether the police had probable cause to arrest based on what they knew at the time, not whether the individual arrested was ultimately guilty or innocent.

Police are not required to ignore circumstances that support a finding of probable cause to arrest simply because a suspect denies the charge. Unraveling the truth of the claims is not a task for the police, but one for the trier of fact in a criminal proceeding. The only decision the police make is whether there is enough evidence that a crime has been committed, and that the individual before them is connected to that crime. If so, they should arrest the individual so that he enters into the criminal justice system and so that an eventual determination of his guilt or innocence can be made by a judge or jury.

The burden rests upon petitioner, as the party opposing summary judgment, to set forth specific facts showing a genuine issue for trial on the material facts of the case; petitioner cannot rely upon mere allegations or denials. *Celotex*, 91 L.Ed.2d at 265. Petitioner has not set forth any material, disputed facts. The court properly granted defendants' motion for summary judgment, finding, as a matter of law, that the police had probable cause to arrest.

There is no reason to grant certiorari here in order to review the entire factual record since the dispositive facts are uncontested and the summary judgment standard was correctly applied.

B.

NO CONFLICT EXISTS BETWEEN THE OPINION BELOW AND THE SETTLED LAW OF THIS COURT OR OTHER COURTS.

Petitioner's principal assertion is that the Seventh Circuit's opinion in this case conflicts with the settled law of this Court, the appellate circuits, and the Illinois Supreme Court. Contrary to petitioner's assertion, the case at bar neither sets a new standard for probable cause nor creates any novel exception to the reliable informer rule. This case is not in conflict with long-established precedent on probable cause; rather, it takes that law and applies it correctly to the particular facts of this case.

The holding of this case is that no false arrest charge may be sustained against arresting officers when an eyewitness private guard (1) states to the officers that he saw the shoplifting take place and saw the shoplifter run back into the store throwing the stolen items on the floor, and (2) personally signs a complaint against the individual. Such a holding is consistent with the facts and breaks no new ground.

It is true that in the court's wide-ranging discussion of probable cause there is a passing reference to the view that the Supreme Court in the *Gates* decision set forth a "lower standard of probable cause."[1] That statement,

[1] The court's actual statement was: "Some parallel rules suggest that one reliable eyewitness is enough. Even before *Gates*, a single tipster could supply probable cause to issue a search or arrest warrant, if the police had reason to think that the informant had firsthand knowledge and was reliable. *See Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); both overruled (in favor of a lower standard of probable cause) by *Gates*. The opin-

(Footnote continued on following page)

however, was dictum and did not form the basis of the decision in this case. The decision, instead, was based on standard probable cause analysis and was a correct application of that analysis to the facts of the case.

The Decision Below Is Consistent With The Standard Set In *Gates*

The standard for probable cause employed in the instant case was the standard set down by this Court in *Illinois v. Gates*, 462 U.S. 213, 230 (1983). As this Court said in *Gates*, probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts. *Gates*, 462 U.S. at 232. Applied to evaluating informants' tips, this standard recognizes that such tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One rigid legal rule will not cover every situation. *Gates*, 462 U.S. at 232.

An informant's "veracity," "reliability," and basis of knowledge are all highly relevant in determining the value of his report. These elements are not entirely separate and independent requirements to be mechanically applied in every case. Rather, they are closely intertwined issues that may usefully illuminate the common sense, practical question of whether there is probable cause. *Gates*, 462 U.S. at 230. This "totality-of-the-circumstances" approach is intended, this Court has said, to be a "practical, non-

---

[1] *continued*
ions in *Aguilar* and *Spinelli* take it as a point of departure that the report of one identified, reliable eyewitness creates probable cause. The Court has never suggested that the police, with such information in hand, must conduct a further investigation or put contradictory evidence into the affidavit." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 440 (7th Cir. 1986).

technical conception." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

Consistent with *Gates*, the Seventh Circuit correctly concluded that the police made a reasonable decision to arrest in light of all the circumstances they found. The arresting officers arrived to find a private informant, specially trained to look for shoplifting by virtue of his job as a security guard in a supermarket. That informant stated to them that he personally witnessed commission of the crime and that after he accosted the suspect that suspect ran back into the store. The guard personally signed the complaint.

This store guard was not a paid professional informant, nor was he making an anonymous tip. Instead, the court properly concluded that the police were entitled to treat him like any other citizen informant and to find him reliable. The guard had been hired for the special task of watching closely for shoplifting. And, as the court noted in its decision, Jewel has an interest in wishing to avoid costly tort litigation and angering honest customers. Thus, it is unlikely to tolerate having its guards make unsubstantiated charges, and so its guards are likely to err on the side of caution. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 439 (7th Cir. 1986). In such a context, the court held, the police were entitled to give the guard's eyewitness testimony at least as much credence as they do reports by private citizen complainants. As this Court has said of such citizen informants in *Gates*, 462 U.S. 213, 233-34:

> Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his

> knowledge unnecessary. *Adams v. Williams*, [407 U.S. 143, 147 (1972)]. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.

The guard was not saying anything inherently incredible; there was no *a priori* reason not to believe him. If Vaughn saw what he said he saw, then the petitioner was the guilty man. The fact that the suspect was an attorney does not change the outcome.

Petitioner argues that the decision at bar could not have applied the "totality of the circumstances" standard set forth in *Gates* because the court never used those precise words. But the rationale of the court shows that the correct standard was used and the court cannot be held in error simply because it did not use the phrase as a talisman. The court in *Gramenos* reviewed all the information known to the officers and the source from which it came. The analysis employed in this case is consistent not only with the standard for probable cause set out recently in *Gates*, but in this Court's earlier decisions as well. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). Given the facts of this case, the outcome reached is entirely proper. No conflict is created, and no review is merited.

No Conflict Exists Between The Opinion Below And Seventh Circuit Decisions

Petitioner further argues that the decision at bar is in conflict with prior decisions of the Seventh Circuit. This argument is meritless for several reasons. To begin with, a conflict between decisions rendered by different panels

of the same court of appeals is ordinarily not a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974). Further, the appellate panel in this case clearly did not believe that their opinion created any conflicts; they denied petitioner's request to rehear the case. Nor did the appellate court as a whole perceive any conflicts, since it denied petitioner's suggestion of rehearing *en banc*.

Moreover, examination of the body of Seventh Circuit law on this question reveals no inconsistencies. Petitioner cites to four Seventh Circuit cases as allegedly in conflict with the decision in *Gramenos*. In fact, in all four of the cases, as in *Gramenos*, the court based its determination of probable cause on whether, in view of all the circumstances, there was a minimum level of reliable information establishing that a crime had taken place and that the suspect was connected with it.

In *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323 (7th Cir. 1978), the first of the Seventh Circuit cases cited by petitioner, an undercover agent for Goldblatt's security department reported to his superiors that he had heard that six store employees were plotting a murder. The murder was allegedly planned for a store security officer scheduled to testify against a former employee fired for stealing store goods. The Seventh Circuit held that the police lacked probable cause to arrest the six employees allegedly involved in the plot. The court based its holding on the fact that the informant had no first-hand information himself, signed no complaint, and the store gave the police no direction to arrest. Additionally, the police did not know the informant who was supplying the information, had no prior experience with him, and had not themselves witnessed any threats. Such a factual situation, where it is not even clear whether a crime occurred at all and

whether there is anything to link the defendants to such a crime, is clearly distinguishable from the case at bar, and represents merely a different result mandated by different facts. The analysis is not in conflict with that employed in *Gramenos*.

Second, petitioner cites to *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985) as a case also allegedly in conflict with the case at bar; again, no real inconsistency exists. The plaintiffs in the *Moore* case were individuals who had left a restaurant without paying because of a dispute over service and were arrested in their camper homes at night. The Seventh Circuit explicitly applied the standard set out in *Beck v. Ohio*, 379 U.S. 89, 91 (1964), that the validity of the arrest depends upon whether "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." The appellate court, in three separate opinions, applied that test to the facts in *Moore* and held that summary judgment should not have been granted on the issue of probable cause.

Writing for the court, Judge Coffey stated that material issues of fact remained to be decided, such as whether the plaintiffs had been present at the restaurant at all, or if their statements that they had been there had been coerced by the night-time entry of the police into their home. *Moore*, 754 F.2d at 1347. Judge Posner agreed, finding that if the entry was without consent the police did not have the right to enter the campers in the middle of the night on a misdemeanor charge, and that the statements by the individuals were coerced and could not form a link between them and a crime. *Moore*, 754 F.2d at

1358. Judge Gibson, in the third separate opinion, concurred that the case must be remanded for a jury trial because there was no warrant and no signed complaint.

In sum, all three members of the panel found that, given the facts of the *Moore* case—an arrest far from the scene of the "crime", in a camper home at night, with no information to link the plaintiffs to the restaurant or any offense other than the suspects' own coerced statements, with no signed citizen complaint filed against the individual—no probable cause existed. Those facts are entirely distinguishable from the facts of the instant case, and there is nothing inconsistent in the two results.

Third, petitioner relies on the recent Seventh Circuit case of *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986). In fact, that case shows precisely the continuity of Seventh Circuit opinions on the issue of probable cause. The court summed up in *BeVier* the teaching of the *Gramenos* case: "There is no general duty to investigate further *after* acquiring information sufficient to establish probable cause." (*BeVier*, 806 F.2d at 127, n.1) (emphasis added). As the court summarized *Gramenos*, where there is a credibility contest between the plaintiff and a store security guard, and where the police have reliable information from the statements of the eyewitness and his signed complaint, probable cause exists. *BeVier*, 806 F.2d at 127, n.1.

The *BeVier* court found that the key to whether there is probable cause is whether the police have sufficient information to make a reasonable decision. In *BeVier*, the information was insufficient to the point where it was "unclear whether a crime had even taken place." *BeVier*, 806 F.2d at 128. In that case a state police officer had arrested parents for child abuse and neglect without ever getting information from *anyone*—babysitter, parents,

third-parties—to establish that the parents had in fact knowingly and wilfully abused their children. As the court summed up, more investigation was needed in such a situation before probable cause could be established. *BeVier*, 806 F.2d at 127. In contrast, in the instant case there was sufficient information provided to the police from the eyewitness statement and signed complaint of the guard to have cause to arrest petitioner. In such circumstances, "an officer who had established cause on every element of the crime need not continue investigating to check out leads or test the suspect's claim of innocence." *BeVier*, 806 F.2d at 128.

The final case cited by petitioner as being in conflict with the decision at bar is *Llaguno v. Mingey*, 736 F.2d 1560 (7th Cir. 1985). The *Llaguno* case first of all concerns vastly different circumstances: an emergency search of a private home in the wake of the shooting of seven people. The court naturally took into account the gravity of the crime and the threat of its imminent repetition in assessing the amount of information that prudent police must collect before deciding to make a search or arrest. *Llaguno*, 763 F.2d at 1565-6. The court applied the test of *Beck v. Ohio*, 379 U.S. 89, 91 (1964), that probable cause means a reasonable basis—"more than bare suspicion, but less than virtual certainty"—and concluded that given the serious situation in the case, the police had probable cause to enter the house. Clearly, the *Llaguno* case presents no conflict with the decision in *Gramenos*.

In sum, the present case is not in conflict with other Seventh Circuit opinions and for that reason does not merit review.

No Conflict Exists Between This Decision And Decisions Of Other Circuits

Petitioner also argues that the decision in the instant case creates conflicts with the decisions of the Fifth, Eighth, and Tenth Circuits. However, there is no conflict between the standard of probable cause used in those circuits and that employed in this case.

The two Fifth Circuit opinions, *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir. 1975) and *Duriso v. K-Mart No. 4195, Div. of S.S. Kresge Co.*, 559 F.2d 1274 (5th Cir. 1977) both focused not on probable cause, but on whether private stores were state actors. In neither case were the police even named as defendants. Additionally, both cases concerned circumstances in which there was either no written complaint signed by a store employee or where the matter was in doubt. Again in both cases the available information establishing that a crime had even taken place was very weak: the plaintiff shopper was either not personally observed committing a crime, or the individual had not even passed through the counter area before being detained. All in all, these two Fifth Circuit cases involve vastly different fact situations than in our case and the analysis employed is not inconsistent with that employed by the Seventh Circuit below.

As for the case petitioner cites from the Eighth Circuit, *El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980), or the case cited from the Tenth Circuit, *Lusby v. T. G. & Y. Store, Inc.*, 796 F.2d 1307 (10th Cir. 1986), both involved outrageous conduct by store employees and police. Because of the issues of excessive force and state action raised in those cases, there was little focus on the issue critical to the instant case—when police have probable cause to arrest. In addition, in *Lusby*, unlike in the case

at bar, no eyewitness information linked the shopper to any crime. No conflict can be said to exist between any of the cases cited by petitioner so as to impel review.

No Conflict Exists Between The Opinion Below And Decisions Of The Illinois Courts

Finally, petitioner argues that the decision of the Seventh Circuit in the case at bar conflicts with settled Illinois law. In particular, petitioner cites to *People v. Tisler*, 103 Ill.2d 226, 469 N.E.2d 147 (1984) as an Illinois Supreme Court case that cannot be reconciled with *Gramenos*. That case does not provide a basis for review for two reasons: (1) there is no conflict between *Tisler* and *Gramenos*; and (2) the factual circumstances of *Tisler* make it largely inapposite.

The focus in *Tisler* was the Illinois state constitutional standard for probable cause. *Tisler* was one of the first Illinois cases decided after this Court's ruling in *Gates*, and in *Tisler* the Illinois Supreme Court explicitly adopted the *Gates* standard for resolving probable cause questions involving an informant's tip under the Illinois Constitution. Therefore, the court in *Tisler* applied the same "totality of the circumstances" standard as was used in the case at bar.

As to the holding of the *Tisler* case, even though the court held that the police had probable cause to arrest, the factual circumstances were quite different from the case at bar and are not helpful to the discussion here. *Tisler* involved a telephone call from an informant who had tipped off the police twice before and this time reported that an individual would be delivering LSD at a certain time and place. Events took place as predicted in the tip, and the defendant was arrested and charged

with possession. *Tisler*, 103 Ill.2d 226, 469 N.E.2d at 150-52. Applying *Gates*, the Illinois Supreme Court concluded that since the informant in *Tisler* had proven to be trustworthy and his tip had been confirmed in virtually every detail prior to arrest, probable cause existed. *Tisler*, 103 Ill.2d 226, 469 N.E.2d 158-160.

It is very difficult to find any aspect of the *Tisler* decision that puts it in conflict with *Gramenos*. The focus of the two cases is simply not the same. The informant in *Tisler* was neither a victim nor an ordinary citizen, but was instead an individual who regularly made tips to the police about criminal activity. Such an informant is akin to a professional or anonymous informant, for whom special reliability guarantees are required, and has little in common with the security guard in the *Gramenos* case who, while specially trained to look for evidence of the crime of shoplifting, is not otherwise like a police informant. There is no conflict here which merits review.

No Basis For Review Exists

In sum, petitioner's arguments for granting certiorari are without merit. Petitioner received careful consideration of the factual record and an application of the correct summary judgment standard. The court made a thorough examination and concluded that while the defendants' motion for summary judgment should be granted on the issue of probable cause, it should be denied on the issue of detention. The detention aspect of the case is now on remand to the district court.

Petitioner's case has been treated with precision and thoroughness, with the Seventh Circuit applying this Court's lessons to the facts before it. No basis for review exists.

CONCLUSION

For all the reasons listed above, respondents JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY respectfully request that this Court deny the Writ of Certiorari.

Respectfully submitted,

JUDSON H. MINER,*
Corporation Counsel of
the City of Chicago,
610 City Hall,
Chicago, Illinois 60602,
(312) 744-0468,

Attorney for Joseph Schmit, Frank Cosgrove, and Sgt. Frank Heatley, Respondents.

RUTH M. MOSCOVITCH,
Chief Assistant Corporation Counsel,

JOANNE SIMBOLI HODGE,
Assistant Corporation Counsel,

Of Counsel.

* Counsel of Record

April 4, 1987

No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

JAMES A. STAMOS
900 W. Jackson Boulevard
Suite 4-E
Chicago, Illinois 60607
(312) 666-7766
Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Are fourth amendment rights violated when the police make an arrest for a minor misdemeanor, absent any exigent circumstances, on the uncorroborated allegations of a supermarket guard where the arresting officers (1) refused to interview available witnesses, (2) conducted no independent investigation, (3) never knew the guard or otherwise established his reliability, and (4) repeatedly refused or declined to hear the petitioner's version of the dispute when he denied the guard's allegations?

2. Has a private supermarket engaged in "state action" in violation of 42 U.S.C. Section 1983 where it knowingly engages in a customary plan or working agreement with the local police

(a) whereby the police allow the attesting of the necessary signatures to a store form-complaint out of the presence of the authorized state official in violation of state law and cause the perjurious document to be filed in the state court to initiate criminal charges, and/or

(b) whereby the police, without independent investigation or probable cause, will arrest anyone the store detains for shoplifting and designates for arrest?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
ARGUMENT:	
I.	
PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED AND THE JUDGMENT OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT, THREE OTHER FEDERAL CIRCUITS, AND THE STATE OF ILLINOIS	1
A. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of The Fifth, Eighth, And Tenth Circuits	1
B. The Decision At Bar Is In Conflict With Other Decisions Of The Seventh Circuit	4
C. The Decision At Bar Conflicts With Decisions Of This Honorable Court Inasmuch As The Seventh Circuit Applies A "Lower Standard Of Probable Cause" To Validate Petitioner's Arrest	6
D. The Seventh Circuit Decision Interpreting Illinois Law Is In Conflict With Decisions Of The Illinois Supreme Court	7
II.	
JEWEL'S ILLEGAL UTILIZATION OF THE CRIMINAL COMPLAINT AND THE CUSTOMARY PLAN OR AGREEMENT WITH THE POLICE MADE JEWEL A STATE ACTOR UNDER SECTION 1983	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) .	9
Aguilar v. Texas, 378 U.S. 108 (1964)	6
Beck v. Ohio, 379 U.S. 89 (1964)	5
BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986) ...	2, 3
Butler v. Goldblatt Bros. Inc., 589 F.2d 323 (7th Cir. 1978)	4
Dennis v. Sparks, 449 U.S. 24 (1980)	9
Gramenos v. Jewel Co. Inc., 797 F.2d 432 (7th Cir. 1986)	2
Illinois v. Gates, 462 U.S. 213 (1983)	6
Llaguno v. Mingey, 736 F.2d 1560 (7th Cir. 1985) .	5
Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336 (7th Cir. 1985)	4, 5
People v. Foss, 18 Ill.App.3d 496, 309 N.E.2d 677 (2d Dist. 1974)	8
Spinelli v. United States, 393 U.S. 410 (1969) ...	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

I.

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED AND THE JUDGMENT OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT, THREE OTHER FEDERAL CIRCUITS, AND THE STATE OF ILLINOIS.

A. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of The Fifth, Eighth, and Tenth Circuits.

Respondents in their opposing brief attempt to rewrite the holding of the Seventh Circuit in the case at bar. In

their attempt to distinguish the authorities cited by petitioner, the respondents argue:

> "None of the cases involved an independent police investigation prior to the arrest as was performed in the instant case." (Resp. Br. p. 2).

This argument flagrantly misstates the Seventh Circuit Opinion in this case. The legal issue at bar is whether the police have probable cause to make a warrantless arrest of petitioner upon the uncorroborated misdemeanor complaint of a retail store security guard, whose reliability was not established, without interviewing witnesses who were available at the scene, or conducting any other independent investigation. The Fifth, Eighth, and Tenth Circuits have answered that question in the negative. (Pet. Cert. pp. 15-17). The Seventh Circuit at bar answered that question in the affirmative, and has framed the issue clearly in its Opinion (App. 10):

> "We therefore take only the facts on which there is no genuine dispute. Vaughn, a store guard, told the police that he saw Gramenos put items in his pocket and try to leave the store with them, and that Gramenos ran wildly through the aisles scattering food after being confronted. Vaughn filled out a criminal complaint and signed it in the presence of the two officers. Gramenos denied everything (except walking quickly through the aisles). *The police interviewed no one else and took Gramenos away. Did they have probable cause?*" (emphasis added). *Gramenos v. Jewel, et al.*, 797 F.2d 432, 438.

The fact that there was no independent investigation at bar is also clear from the Seventh Circuit's own summary of the case in its November 18th Opinion in *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986), wherein the court stated:

> "In *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986), this Court concluded that there is no general duty to investigate further after acquiring information sufficient to establish probable cause. *Id.* at 437-442. In that case the police arrested the plaintiff for shoplifting. The security guard at the store told police that he saw the plaintiff running down the aisles pulling items from his pockets; plaintiff denied this to the police. The Court rejected plaintiff's contention that the police should have questioned other witnesses before arresting him. *Gramenos* essentially involved a credibility contest between the plaintiff and a store security guard." 806 F.2d at 127, n.1.

Respondents' reliance on this factor of independent investigation as a distinguishing characteristic is misplaced. There was no independent police investigation in this case. The store security guard told the police to arrest petitioner, and they did. The police never interviewed the store manager, who would have contradicted the guard's allegations, or other witnesses who would have been material witnesses as to the issue of probable cause to arrest. This is the basis of the 1983 action, and has been petitioner's position since the onset of this litigation. This is also the basis of the Seventh Circuit's Opinion at bar. In its opinion the court stated that the police "may have exercised poor judgment" (App. 7), but concluded that no independent investigation was required, holding (App. 17):

> "We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices."

For respondents to attempt to argue at this stage in the litigation that there was independent police investigation, when the Seventh Circuit concluded that there was not,

is merely an attempt to avoid the clear conflict between the Seventh Circuit Opinion and the holdings of the other Federal Circuits. In misdemeanor cases involving private store security guards the Fifth, Eighth, and Tenth Circuits require independent investigation by the police, prior to arrest, in order to establish probable cause. (Pet. Cert. pp. 15-17).

B. The Decision At Bar Is In Conflict With Other Decisions Of The Seventh Circuit.

Respondents' Brief does not even attempt to distinguish *Butler v. Goldblatt Bros. Inc.*, 589 F.2d 323 (7th Cir. 1978). (Pet. Cert. pp. 18-19). That case stressed the necessity of independent investigation by the police to corroborate information received by a store security guard in order to establish probable cause. In *Butler*, The Seventh Circuit concluded,

> "Is is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations . . . a reasonable man could not find that the arrests were based upon probable cause." 589 F.2d at 325-326.

In this case, respondents challenge the applicability of *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985), arguing that *Moore* involved a warrantless arrest at plaintiff's campsite, as opposed to an arrest at the scene of the alleged crime. (Resp. Br. p. 4). This argument misses the thrust of the Seventh Circuit's analysis and holding in *Moore*. The critical factors identified by the court in *Moore* were that: (1) *Moore* involved a misdemeanor, as opposed to a felony; (b) there was no serious or immediate threat to anyone's safety; and (c) a huge amount of money was not involved in the dispute. 754

F.2d 1336, 1345 (7th Cir. 1985). *Moore* holds that under those circumstances police are obligated to conduct an independent investigation prior to arrest in order to establish probable cause. The court stated,

> "It is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention." *Id.* at 1345-46.

In *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985), the Seventh Circuit balanced the amount of information available to the police with the situation they faced to decide whether probable cause to search existed. The court determined that,

> "The amount of information that prudent police will collect before deciding to make a search or an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime, and especially the danger of its imminent repetition." 763 F.2d at 1566-67.

Comparing *Moore* and *Llaguno* with the case at bar, it is evident that the arresting officers did not have the requisite probable cause to arrest petitioner. There was no fear that petitioner, clearly identified to police as an attorney, was about to flee. The allegation of shoplifting was not a serious crime, and there was no threat of its imminent repetition. The Jewel store was closing for the evening. The witnesses identified by petitioner were available and present at the scene of the alleged offense, and an independent investigation could have easily been conducted by the police prior to deciding whether to invoke the awesome power of arrest.

Petitioner also relied upon *Beck v. Ohio*, 379 U.S. 89 (1964), both in the Seventh Circuit and in his Petition before this Court. (Pet. Cert. pp. 19-21). The Seventh Cir-

cuit ignored this case, making no reference to it in the Opinion. Instead, the Seventh Circuit applied a lower standard of probable cause to deny petitioner relief.

C. The Decision At Bar Conflicts With Decisions Of This Honorable Court Inasmuch As The Seventh Circuit Applies A "Lower Standard Of Probable Cause" To Validate Petitioner's Arrest.

Respondent acknowledges that the Seventh Circuit said that *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), were "both overruled (in favor of a lower standard of probable cause) by *Gates*." (Resp. Br. p. 5) (App. 13). However, respondent argues that this *lower standard of probable cause* was never applied, and that the Opinion of the Seventh Circuit purportedly shows that the "totality of the circumstances" test was applied (citing the Seventh Circuit Opinion at 797 F.2d 439-440). (Resp. Br. 5). This is not correct. An examination of the Seventh Circuit's Opinion fails to reveal any mention of the term, "totality of the circumstances". The fact of the matter is that the reason the Seventh Circuit made reference to the new "lower standard of probable cause" in this case was because the court applied it to justify the arrest of petitioner on the uncorroborated allegations of an unreliable informant. Johnny Vaughn, the part-time Jewel security guard, was unknown to the police prior to this incident. (App. 6). Moreover, Vaughn had been convicted of a criminal offense. (R. 94-V, pp. 43-45, 55). Under those circumstances petitioner's arrest would not have been valid prior to the decision of this Honorable Court in *Illinois v. Gates*, 462 U.S. 213 (1983), nor is it valid after *Gates*.

However, in this case, the Seventh Circuit created a new "supermarket guard" exception to the reliable informer rule. The court noted that "Even before *Gates*,

a single tipster could supply probable cause to issue a search or arrest warrant, if the police had reason to think that the informant had firsthand knowledge and was reliable." (App. 13). In this case the Seventh Circuit then postulated a new rule for post-*Gates* cases. Their new rule is that the supermarket "guard is not just any eyewitness" and that "Police have reasonable grounds to believe a guard at a supermarket". (*Id.* at line 1). Based upon this reasoning, the Seventh Circuit found probable cause for petitioner's arrest without any need for independent investigation by the police. Thus, it is clear that the court utilized the "lower standard of probable cause" in reaching its decision in the instant case. The holding was not mere "dicta" as respondents suggest. (Resp. Br. p. 5). The Seventh Circuit's decision is as unprecedented as it is unjust.

This Honorable Court has never held that there is a *lower standard of probable cause* after *Gates*, nor has it ever sanctioned the transmutation of a private part-time security guard into a reliable informer. Nor has this Court ever reduced the standard of probable cause to a level where warrantless arrests may be made in a misdemeanor case where there is neither a reliable informer, nor independent investigation. Certainly not in *Gates*, where in the absence of a reliable informer, the police engaged in extensive independent investigation to establish probable cause. Certiorari should be granted at bar to resolve the conflict between the decisions of this Honorable Court and the Seventh Circuit.

D. The Seventh Circuit Decision Interpreting Illinois Law Is In Conflict With Decisions Of The Illinois Supreme Court.

The respondent represents to this Court that the Seventh Circuit Opinion in the case at bar has adopted the "total-

ity of circumstances" standard. (Resp. Br. p. 6). To the contrary, the Seventh Circuit Opinion nowhere mentions this standard as the basis for its decision.

Instead, the Seventh Circuit attributes to the State of Illinois a rule of law which is non-existent and less than the constitutional standard governing probable cause to arrest. The Opinion holds (App. 11-12):

> "Vaughn was an eyewitness. The facts he related to the police (if he told the truth) establish a crime. Vaughn said that Gramenos had passed the checkout counter and was about to leave the store. Gramenos's identity was not in dispute. In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest. E.g., *People v. Foss*, 18 Ill.App.3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974). *The Supreme Court has not spoken on the question. . .*" (emphasis added).

This Honorable Court has never ruled on this issue, nor has any Illinois court so ruled, contrary to the assertion of the respondent.

II.

JEWEL'S ILLEGAL UTILIZATION OF THE CRIMINAL COMPLAINT AND THE CUSTOMARY PLAN OR AGREEMENT WITH THE POLICE MADE JEWEL A STATE ACTOR UNDER SECTION 1983.

Respondent argues that the abuse and utilization of the state criminal procedures by respondents, although in violation of state law, violated no federal law or constitutionally protected right. (Resp. Br. p. 7).

Petitioner has shown that his constitutional rights were violated pursuant to a customary plan and agreement which existed between the respondent Jewel and the police whereby the police would arrest any person named in the store complaint or "fingered" by a Jewel security guard

and put them in jail without a formal or lawful criminal complaint. (Pet. Cert. pp. 26-28).

In *Dennis v. Sparks*, 449 U.S. 24 (1980), this Court held that private parties acted under color of law when corruptly conspiring with a state judge in a joint scheme to defraud. In the case at bar, the customary plan or agreement included utilizing the state criminal complaint to jail and prosecute the petitioner in the state court by falsely attesting to the affidavit. (See copy, App. 29).

The verified record in this case is replete with documentation that the police would arrest anyone Jewel would name in their criminal complaint form without probable cause. For example, the arresting police officers, in their answer to petitioner's amended complaint, admitted that the arrest of petitioner was based solely on the respondent supermarket's criminal complaint. (R. 43, para. 4) (R. 32, paras. 9-11).

The respondents argue that this conduct of misuse or abuse of a state statute does not allow for a valid cause of action under Sec. 1983. (Resp. Br. p. 8). However, this Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), said that private parties are subject to liability under Sec. 1983 when engaged in a conspiracy with one or more parties acting under color of state law. This Court in *Adickes* held:

> "The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized or lawful; (citations omitted). Moreover, a private party involved in such a conspiracy, even though not an official of the State can be liable under Section 1983. . . ." *Adickes*, 398 U.S. at 152.

Petitioner has demonstrated, consistent with this Court's holding in *Adickes*, that petitioner's Fourth and Fourteenth Amendment rights were violated when respondents, under color of state law, utilized the Jewel store's criminal complaint form to arrest petitioner and/or jail and prosecute him.

CONCLUSION

For these further reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES A. STAMOS
900 W. Jackson Boulevard
Suite 4-E
Chicago, Illinois 60607
(312) 666-7766
Counsel of Record